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ABSTRACT

The legislative authority for Navajo education is examined in this two-part report, designed to help the Navajo people attain meaningful control of the education of their youth, with the continued appropriate involvement of the federal and state governments. Part 1 summarizes the key provisions of the relevant sources of legal authority which govern Navajo education. The legal status of the Navajo Tribe is described with regard to tribal sovereignty, tribal government and relationship with the federal government, and a detailed compendium of federal (16 sources), Navajo (8 sources), and state law regarding education is presented. Part 2 assesses the educational powers and duties of the United States, the states of Arizona, New Mexico and Utah; and the Navajo Tribe. The roles of each are examined in the context of the three types of schools on the reservation, i.e., state public schools, Bureau of Indian Affairs schools and "contract" schools. Existing obstacles to and opportunities for expanded tribal authority (pertaining to education standards, enrollment, and bilingualism) are discussed. An institutional arrangement for consideration as the formal mechanism for operating a unified Navajo-controlled educational system is suggested. Footnotes are included, and statutes, regulations, and resolutions are appended. (JMM)

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ANALYSIS OF

NAVAJO EDUCATION AUTHORITY

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Submitted To
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PREFACE

This is a study of Navajo education prepared under Contract No. 161742, an agreement between the Navajo Nation Division of Education and the law firm of Kahn & Kahn, Washington, D.C.

Part One of the study consists of a compendium of legislation governing Navajo education.

Part Two includes an analysis of federal, state, and tribal legislative authority with respect to several important issues.

PART ONE

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ANALYSIS OF
NAVAJO EDUCATION AUTHORITY

PART ONE

Submitted To
The Navajo Nation
Division Of Education

I.
INTRODUCTION

This is a study of legislation. Its purpose is to assist the Navajo people achieve greater control of the education of their youth, by providing legislative information and analysis for developing a long-range tribal education policy.

This study summarizes the key provisions of the various sources of legal authority which govern Navajo education; examines the authority possessed by the United States, the states, and the Navajo Nation; and identifies the significance of that authority with respect to several significant issues in Navajo education.

It describes the legal obstacles to the Tribe's efforts to control Navajo education. As an analysis of existing law and policy, it does not recommend to the Tribe changes in law or policy or strategies for effecting change. Those are decisions that the Navajo Tribe must make in seeking educational self-determination.

Indian control of education has been a Congressional mandate since the enactment of the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638). This goal of Indian control has not been realized, and the fault lies - to varying degrees - with all involved parties: Congress, the Bureau of Indian Affairs, the Department of Education, the States of Arizona, New Mexico, and Utah, and the Tribe.

Indian education is a national tragedy. The Kennedy Commission found, in 1969, that virtually every aspect of the schooling available to Indian children was of deplorably low quality.

The children of the Navajo Nation have suffered along with all other Indian children. Although significant improvements in the education offered Navajo children have been achieved since 1969, clearly more are needed.

Nearly a third of the entire Navajo Nation is functionally illiterate. The drop-out rate among Navajo students is approximately twice the national average, and the average age at which Navajo students drop out is substantially

lower than the national average. Every measure of Navajo children's education is testimony to the failure of federal and state efforts to establish a minimally acceptable education system for the Navajo.

There are numerous, well-documented causes of the failures of Indian education. Federal and state agencies have historically used education to pursue their goals of assimilation or termination. Indians have been denied control and even participation in their own education programs. The subjects of instruction are often irrelevant to Indian needs; the methods of instruction inappropriate to their culture. Funds allocated to Indian education have been woefully inadequate, and have often been used by federal and state agencies to expand their educational bureaucracies rather than to improve education directly.

Three different types of groups - federal, state, and community - administer public or publicly-funded schools on the Navajo Reservation; each has its own objectives, guidelines, and funding. The three generally act in isolation in pursuing their own goals.

This report does not inquire into these or other causes of inadequate Indian education. It examines only the issue of Indian control of education, specifically the legislation that authorizes the Navajo Tribe, the states, and the federal government to decide how to educate Navajo students.

II.

LEGAL STATUS OF THE NAVAJO TRIBE

TRIBAL SOVEREIGNTY

The unique status of Indians and Indian tribes in American society has evolved through several hundred years of history and a substantial body of law (5,000 statutes, 2,000 regulations, 389 treaties, 2,000 federal court decisions, and 500 Opinions of the Attorney General).[1] Yet examining the legal status of the Navajo Tribe is not an idle exercise; basic questions continue to be asked about the definition of terms such as "Indian," "tribe" and "reservation."[2]

Even after the passage of the Indian Self-Determination Act in 1975, the question remains:

> Whether tribes are going to be permanent, on-going political institutions exercising the basic powers of local government or whether they are to be transient bodies relegated to mere "service delivery vehicles" for Federal assistance programs; mere "Federal instrumentalities" for the control of the social behavior of their own tribal membership pending their ultimate assimilation into the dominant society which surrounds them.[3]

The legal capacity of Indian tribes was acknowledged by the United States in the treaty-making of the 1800's. The Treaty of 1868 with the Navajo and the treaties with other tribes evidenced the federal government's recognition that Indian tribes were sovereign governments, i.e., that tribes

had the capacity and authority to impose rules or laws controlling the actions of individuals on the lands under their jurisdiction.[4]

The U. S. government's primary purpose in invoking the concept of tribal sovereignty was to facilitate the taking of Indian land. Tribes were legally assumed to have the authority to cede their lands to the federal government by treaties.

Tribal sovereignty was first judicially recognized by the Supreme Court in Worcester v. Georgia, in 1832 and has received inconsistent treatment since.[5] Over the years the Court has used a variety of constructions in attempting to reconcile tribal sovereignty with the plenary authority of Congress to legislate for tribes in all matters, including their form of government.[6]

The Court appears to have resolved any lingering questions about tribal sovereignty in two fairly recent cases. In U.S. v. Mazurie, it found that "Indian tribes are unique aggregations, possessing attributes of sovereignty over both their members and their territory. . ." [7] In U.S. v. Wheeler, the Court reiterated Felix Cohen's assertion that "the powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished' (emphasis in original)".[8]

The Court, in Wheeler, recognized that the tribes have

been divested of some aspects of the sovereignty which they had previously exercised, but they have not given up their full sovereignty, and held,

> [Tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[9]

Tribes are not free independently to determine their external relations. But they are free independently to determine relations among their members. The Supreme Court has said that implicit in the terms of the Treaty of 1868 was the understanding that the internal affairs of the Navajo remained exclusively within the jurisdiction of the tribal government.[10]

According to the Court, this power does not derive from the Federal government.

> If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaty or statutes infers the right of self-government in general. . .[11]

Tribes today maintain the right of self government they enjoyed as a sovereign power prior to the coming of Europeans.

TRIBAL GOVERNMENT

The Navajo Tribe is governed by a Tribal Council which is presided over by an elected Chairman and Vice Chairman. The Tribal Council functions under by-laws first issued by the Secretary of the Interior in 1938.

There is no tribal constitution because (1) the Navajo declined to accept the provisions of the Indian Reorganization Act of 1934 which would have required such a constitution; (2) the Secretary of the Interior refused to approve an independently drafted Navajo constitution; and (3) the Tribal Council did not promulgate the constitution authorized by the Navajo-Hopi Rehabilitation Act.

The Secretary of the Interior attempts to exercise control over the Council by approving or disapproving resolutions and budget items, and even by convening Council meetings. His authority to do so is questionable, as the 1938 rules do not define or limit what the Council may do, nor do they require Secretarial approval of all tribal resolutions. Congress could limit the Council's powers and require Secretarial approval of tribal resolutions, but it has not.

The Tribal Council includes a number of standing committees, one of which is the Education Committee. The committees function in an advisory capacity to the Council. An Advisory Committee exercises the full Council's powers when the full Council is not in session.

The executive branch of tribal government consists of the Chairman, Vice Chairman, and numerous administrative departments, including the Division of Education. The Chairman and Vice Chairman are elected by a vote of all enrolled members of the Tribe.

The judicial branch of the Navajo Tribe has several trial courts and an appellate court in which cases are heard de novo. Judges are appointed by the Chairman with the approval of the Council.

RELATIONSHIP WITH THE FEDERAL GOVERNMENT

The relationship between American Indians and the United States government is unique. It is based upon the Constitution, the legal theory of guardianship, and the powers associated with federal ownership of the lands which Indians occupy.

The commerce clause of the United States Constitution gives Congress power to "regulate commerce . . . with the Indian Tribes." The other clauses of the Constitution which have served as sources of federal power over Indians are the clauses empowering Congress to make treaties, to make war, to control property of the United States, and to admit new states.

The federal government's exercise of legislative power

excludes most state jurisdiction within the boundaries of Indian lands. The establishment of a reservation for the exclusive use and occupancy of a tribe preempts any state authority that conflicts with that purpose.

In the absence of federal legislation to the contrary, Indian tribes have criminal and civil jurisdiction on reservations, and the states do not.

Public Law 280, in 1954, extended state criminal and civil law in court proceedings into Indian country.[12] It empowers state courts to serve as forums for resolving private disputes, but does not permit state legislatures generally to regulate conduct in Indian country. Arizona, New Mexico, and Utah have assumed jurisdiction in specific matters by overriding their constitutional disclaimers barring jurisdiction in Indian country. Since 1968, no state can assume P.L. 280 jurisdiction without the consent of the tribe affected.[13]

A number of federal statutes, usually not mentioning Indians expressly, have been construed to expand federal jurisdiction in Indian country. They have had a strong impact on the reservations even though they were not directed at the juridictional relationship between the tribe, the state, and the federal government. Examples of general federal legislation that may have effect in Indian country are the Administrative Procedure Act, including the Freedom of

Information Act; the National Environmental Policy Act; and the Clean Air Act.

The U.S. Supreme Court has been extremely protective of tribal self government when states have asserted jurisdiction over Indians in Indian country. It has frequently held that state power over Indians on Indian reservations has been preempted by Congress, unless there is a federal statute expressly giving state jurisdiction over the reservation.

Chief Justice Marshall characterized the relationship between Indians and the United States as a "trust" relationship in 1831.[14] The courts since then have described the responsibility of the federal government as that of a fiduciary or guardian, and they have required the government to conduct its dealings with Indians by the highest standards.

The trust responsibility is a general obligation not limited to specific provisions in treaties or statutes. It extends beyond identifiable real or personal property which may be held in trust. The United States is obligated to provide services and take appropriate actions necessary to protect tribal self-government.

Tribes can sue for money damages resulting from a breach in the trust responsibility. Numerous successful suits have been brought in the U.S. Court of Claims for loss of land and mismanagement of resources.

Although Congress is not subject to suit for violation of

the trust responsibility, administrative officials of executive branch agencies such as the Departments of Interior and Education are directly accountable to the tribes through court actions for injunctive and declaratory relief.

The trust responsibility does not empower the Congress or the Bureau of Indian Affairs to control the daily affairs of Indian tribes and individuals. As noted by the American Indian Policy Review Commission in 1977, Congress and the courts have interpreted trust law as providing for federal protection, not federal domination.[15]

Although the ultimate legal responsibility for Indian education rests with the states, Congress has authorized the Bureau of Indian Affairs ("BIA) to provide educational services and has regularly appropriated funds for that purpose.

No federal statute requires the continuation of educational programs, but the United States did agree in the Treaty of 1868 with the Navajo to provide teachers and educational services for an unspecified period of time.

Current BIA education policy limits federal trust responsibility to a specific class of Indians: enrollment in BIA day schools is limited to children of at least one fourth Indian blood who reside on Indian land under the BIA's jurisdiction.

III.

COMPENDIUM OF SOURCES OF AUTHORITY

FEDERAL LAW

Education Amendments of 1978
P.L. 95-561, Title XI
20 U.S.C. §§ 3385,3385a,3385b,3386 (Supp. II, 1978)
25 U.S.C. §§2001-2019 (Supp. III, 1979).

Title XI addressed four problems identified by an advisory study group:

1. the lack of Indian involvement and participation in both public and BIA school programs;
2. the need for increased funds to meet the higher cost of basic education programs for Indians;
3. the lack of adequate funding to meet the special needs of Indian students, preferably through the Indian Education Act of 1972; and,
4. the lack of Congressional direction for a coordinated educational system within the BIA.[16]

The legislation's intent was to ensure that the BIA took action to implement Congressional mandates, as evident from this comment in the House Committee report:

> Although the BIA does have administrative authority to make many of the needed changes identified by the Committee, bureaucratic inertia has thwarted such progress. Additionally, the Committee has found reluctance on the part of some key Bureau employees to solicit and encourage input by Indian tribes,

> organizations and parents. These Bureau employees . . . still support the outdated concept of "doing things for the Indians." Congress must take immediate steps to see that this misguided policy, already repudiated by the Indian Self-Determination and Education Assistance Act of 1975, is changed forthwith.[17]

Part A of Title XI amended P.L. 81-874's provisions for impact aid to school districts that include non-taxable federal property. It changed the weighting factor for computing the entitlement of local school districts which provide public education to Indian children whose parents reside on reservations, and it spelled out the policies and procedures which each district receiving these payments must establish to ensure the increased participation of Indian parents and tribes in the education process.

The changed entitlement and participation requirements apply to all local school districts which receive P.L. 81-874 payments. The local school district does not have the option of non-compliance by foregoing the increased entitlement.

The policies and procedures that each school district are required to establish must provide that:

1. Indian children claimed for fund entitlement purposes participate on an equal basis in all school programs with all other children;
2. applications, evaluations, and program plans are adequately disseminated to the tribes and the parents of Indian children; and

3. tribes and parents are (a) given an opportunity to present their views with respect to the application, (b) actively consulted and involved in the planning and development of programs assisted, and (c) given a general opportunity to present their overall views on the educational program and the degree of parental participation allowed. [18]

A tribe or its designee may file a written complaint with the Secretary of Education regarding any action of a local school district that may not meet these requirements. The Secretary will then hold a hearing into the matters relating to the complaint.

If the school district rejects the findings of the Secretary, or if it does not undertake the required remedy within the time established, and the Secretary determines that an extension of time will not effectively encourage the remedy, the tribe may elect to contract with the Bureau under Title I of the Indian Self-Determination and Education Assistance Act to provide educational services or elect to have such services provided by a BIA school. In either case the transition shall be carried out as expeditiously as possible.

Part B of Title XI of P.L. 95-561 deals with BIA programs. The Secretary of Interior is required to establish standards for the basic education of Indian children in BIA

and contract schools. The standards apply to BIA schools and to a lesser extent, to contract schools.

The Secretary must help contract school school boards implement the standards at the school boards' request. He cannot refuse to contract with any school board because it fails to meet the standards. He must provide alternative or modified standards to take into account the needs of Indian children at the contract school, if the school board asks for such standards.

The Secretary must provide alternative or modified standards to bring the programs of a school into compliance with the accreditation requirements of the state in which the school is located.

Under Section 1121(d), a tribal governing body, or the local school board if designated by the tribal governing body, can waive the standards established by the Secretary, if it deems those standards to be inappropriate or ill-conceived. It can also revise the standards to reflect the specific needs of the tribe's children. The Secretary must accept such revised standards unless he specifically rejects them for good cause and in writing to the affected tribes or local school boards, in which case his rejection is final and unreviewable.

The Secretary of Interior is required to submit, with the annual budget request for BIA educational services, a detailed plan to bring all BIA and contract schools up to the level

required by the applicable standards. The Act authorizes the appropriation of the necessary funds to bring all BIA contract schools up to the level of the standards established.[19]

The House Committee Report noted that Indian tribes may request adjustments to the standards, but the Secretary has the ultimate discretion to make the requested adjustments, a discretion the Committee expected the Secretary "to exercise . . . freely."[20]

Section 1122 requires the Secretary to establish national criteria for dormitories at Bureau and contract schools. Such criteria must include adult-child ratios and the need for counselors, space, and privacy. The Secretary must submit to Congress, with the annual budget request for BIA educational services, a detailed plan to bring all BIA and contract boarding schools up to the criteria established.

Section 1125 requires the Secretary to bring all schools, dormitories, and other facilities operated by the BIA or contract schools into compliance with all applicable federal or state health and safety standards, whichever provide greater protection. He must submit an annual plan to bring facilities into compliance.

Section 1126 transfers the responsibility for and authority over education programs within the BIA to the director of the BIA's Office of Indian Education Programs.

The House Committee report admonished the director to

exercise this authority with restraint observing that other sections of the Act "adequately demonstrate the Committee's intention to give local schools the authority to function as autonomously as possible."[21]

The Committee wanted it "plainly understood that it envisions local parent committees functioning in a role analogous to local school boards."[22] The House Committee intended this transfer of authority as a complement to the shift in authority for daily program, budget, and personnel decisions to the local school supervisors and local school boards.

Section 1126 also transfers direct supervisory authority over BIA education personnel in all Bureau levels to the Office of Indian Education Programs.

Section 1129 requires that funds for all BIA schools be spent on the basis of local financial plans prepared by the local school supervisor in active consultation with the local school board. The local school board has the authority to ratify, reject, or amend such financial plan and any expenditures under it. An action of the local board may be overturned by the BIA superintendent for education for good cause and in writing.

Section 1130 reads as follows:

> It shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

The House Committee said it regretted that Section 1130 was necessary. "Despite its public statements supporting the policy of Self-Determination, the BIA seems to resist this policy in its dealings with tribes." It said that the language of P.L. 93-638 clearly does not limit participation and self-determination to contracting.[23]

Section 1131 established a process for hiring BIA educators designed to avoid the cumbersome recruitment requirements of the Civil Service system, which have caused many BIA teacher positions to remain vacant for long periods.

Local school boards may waive any qualifications established by regulation in order to hire a tribal member to teach courses on tribal culture and language. Before anyone is hired for an education position in a school by the school supervisor or agency superintendent, the local school board must be consulted. A decision by the school board that a person should or should not be hired must be followed by the supervisor unless he appeals to the agency superintendent and the superintendent, for good cause and in writing, overturns the determination of the school board. A similar process is provided in the case of a proposed discharge of an educator by the supervisor.

Part C amends the Indian Education Act of 1972. It

extends the Act through October 1, 1983. It gives parent advisory committees input into hiring personnel with Indian Education Act funds, but does not give the committees control over the hiring and firing of those personnel.

Indian Education Policies,
25 C.F.R § 31a

Transfer of Indian Education Functions,
25 C.F.R § 31b.

As required by P.L. 95-561, the BIA issued regulations amending 25 C.F.R. Parts 31a and 31b. Part 31a, Indian Education Policies, sets forth the policies to be followed by all schools under the BIA's jurisdiction. The regulations provide that the Bureau's policy is to,

> insure that Indian tribes . . .fully exercise self-determination and control in planning, priority setting, development, management, operation, staffing and evaluation in all aspects of the education process.[24]

The BIA shall "be guided" in developing policies and funding priorities by "systematic consultation" with tribal governing bodies.[25]

BIA policies for Indian education include the following:

1. develop with tribes a plan to include tribal involvement in the planning of BIA operated post-secondary schools through the formation of policy making governing boards;

2. encourage and defend the right of tribes to govern their own internal affairs in all matters relating to education and their right to determine the composition of governing boards at BIA off-reservation and post-secondary schools;
3. provide for a comprehensive multi-cultural and multi-lingual educational program to preserve Indian languages, cultures, and histories;
4. assist tribes in developing departments of education, education codes, and comprehensive education plans;
5. give Indian students the opportunity to attend local day schools and other schools of choice and the option to attend boarding schools. Each school must establish its attendance area in cooperation with neighboring schools;
6. serve as an advocate for tribes in education matters before the federal, state and local governments, and for Indian students in public and other non-Bureau schools consistent with the wishes of the appropriate tribe;
7. promote the community school concept by encouraging year round multi-use of educational facilities, equipment, and services;
8. provide day and residential educational services as

close to an Indian student's home as possible;

9. extend to tribes the prerogative of determining the professions and fields of study in post-secondary education which are of the highest priority;
10. vigorously encourage and support alternative, innovative, and exemplary programs reflecting tribal and village learning styles;
11. enforce a strict standard of fiscal, programmatic, and contract accountability to the tribes;
12. encourage and assist all BIA and contract schools to attain appropriate accreditation; and
13. assist and promote the establishment of Indian, regional and/or national accrediting associations for all levels of Indian education.[26]

Part 31b provides for the transfer of Indian education functions, changing the authority for the administration of the education program of the BIA. Control over agency and area education functions is transferred from the Commissioner of Indian Affairs to the Director, Office of Indian Education Programs, as required by P.L. 95-561, Sections 1126 and 1127.

Education Standards
25 C.F.R. §31e (Draft)

On August 14, 1981, the Office of Indian Education programs issued the third preliminary draft of the minimum academic and dormitory standards required in P.L. 95-561. A final third draft will be published in the Federal Register.

The regulations state that "the essential education of Indian students is an interdependent responsibility that must be shared by the parents, the community, the tribe, and the school."

Tribal power lies in Section 31e.7(b), which provides that a tribal governing body, or the school board of a BIA school if designated by the tribal governing body, shall have the authority to waive the standards established in the regulations where the tribe deems the standards to be inappropriate.

A tribe also has the authority to revise standards to take into account the specific needs of the tribe's children.

Such waivers and revisions, however, must be authorized by the Assistant Secretary for Indian Affairs, who may reject them for good cause and in writing to the tribe or school board. His rejection is final and unreviewable.

If the Secretary wishes to revise substantially the regulations, he must consult with tribes and consider their views.

Many of the BIA standards refer to qualifications or requirements imposed by the state. For example, a substitute teacher must meet state qualifications; staffing patterns must meet state accreditation requirements; all BIA educators must hold certificates from the appropritate state authority; student attendance policies must comply with state statutes; written curricula, approved by the BIA, must integrate state requirements; library and media centers must meet state accreditation standards; graduation requirements must meet those of the state; counseling services must meet state accreditation standards; and kindergarten programs must meet state requirements.

Education Personnel
25 C.F.R. §31g

The BIA's regulations regarding education personnel in BIA schools and agency offices are set out in 25 C.F.R. Part 31g. The regulations implement the Education Amendments of 1978 by:

1. defining education positions and the terms and conditions of employment of educators in the BIA;
2. establishing a system for recruitment, employment, and payment of teachers and other personnel in BIA schools and agency programs; and
3. providing for the participation of Indian school boards in education personnel decision-making.

The regulations delegate a substantial amount of power to local Indian school boards.

School boards may waive education and state certification requirements for tribal members teaching tribal culture and language. Appointment of local school employees, school supervisors, and agency office education personnel is final only upon receipt of written approval by the school boards. Local school boards must be given an opportunity to submit written determinations regarding contract renewals. They may recommend or issue written approval or disaproval of the discharge of any educator. Their recommendations or determinations may be reversed by BIA officials in writing for good cause. [27]

Schools boards may not direct, control, or interrupt the day to day activities of BIA employees in education programs.

BIA education employees who were employed on October 31, 1979 are exempt from the regulations.

Indian Self-Determination and Education Assistance Act
P.L. 93-638 (1975)
25 U.S.C. §§450-450n, 452, 455-458e (1976).

The Indian Self-Determination and Education Assistance Act was passed by Congress in January, 1975, after several years of federal interest in Indian education highlighted by the Kennedy Commission's report in 1969 and President Nixon's message to Congress on Indian Affairs in 1970.

The Act's objective was to assure Indians control over many important services provided for them by the federal government. It makes an explicit connection between Indian self-rule and Indian education.

P.L. 93-638 consists of two separate titles: the Indian Self-Determination Act (Title I) and the Indian Education Assistance Act (Title II).

The first two section of Title I direct the Secretaries of the Interior and of Health, Education and Welfare (now Health and Human Services) to contract for Indian control of federal programs described in the Act "upon the request of any Indian Tribe."[28]

The Secretary may not deny a request unless he finds that (1) the service to be rendered to the Indians "will not be satisfactory"; (2) "protection of trust resources is not assured"; or (3) the "function to be contracted for cannot be properly completed . . . by the proposed contract." He shall consider whether the tribe would be "deficient in performance

under the contract. . ."

This was a change; tribes previously had the burden of persuading the Secretary that a program was suitable for contracting and that the tribe could manage it. It was not a major change, however, because the Secretary retained the right to decide whether to contract. If he decides not to contract, he must merely explain his reasons.

Furthermore, if the Secretary is willing to contract but wants to negotiate specific terms, he can use the leverage provided by his right to deny contracting requests to obtain the terms he desires.

If the Secretary denies a request to contract, he must provide the tribe or tribal group with written notice of his findings, opportunity for a hearing and appeal, and, "to the extent practicable," assistance to help overcome his objections to the request.[29]

The other provisions of Title I are designed to implement contracting for assumption of federal programs.

Section 106, for example, authorizes the Secretaries of Interior and Education to waive federal contracting laws which they find are not appropriate for the purposes of a particular contract or are inconsistent with the Act.[30] It also allows tribes to return contracted programs to the federal government and to extend contracts for up to three years.

Section 109 enables the federal government to reassume

contracted programs for health, safety or welfare reasons or where there is gross negligence or mismanagement in the handling of funds. [31]

Section 110 protects the sovereign immunity of Indian tribes and specifies that the Act does not authorize nor require termination of any trust reponsibility of the United States with respect to Indians.[32]

Title II, The Indian Education Assistance Act, addresses Indian Education in public schools. Part A amends the Johnson O'Malley Act. It requires that prospective JOM contractors submit, for advance approval by the Secretary, an education plan containing educational objectives which adequately addresses the educational needs of the Indian students to be served.[33]

Part A also requires that schools have parent committees from the local community and that the Secretary prescribe the duties and structure of the local committees.[34] This section's requirement for a parent committee can be met by a preexisting Indian advisory school board or by a local committee established pursuant to section 305 (b)(2)(B)(ii) of P.L. 92-318, at the discretion of the Tribal Council. School Boards composed of a majority of Indians are exempt from the parent committee requirement.[35]

Where non Indian students participate in contracted programs, money spent under such contracts must be prorated to

cover the participation of only the Indian students.[36] The Secretary of the Interior is authorized to reimburse school districts for educating non-resident Indian students living in federal boarding facilities.[37]

Part B of Title 2 authorizes federal assistance for building school facilities in public school districts that serve Indians on or near reservations. States receiving such federal assistance must agree in the construction contract to provide Indian students attending any constructed facilities with standards of education not less than those provided non Indian students in the same school district. The Secretary must consult with any affected tribe prior to entering any construction contract, unless the application for a contract is submitted by a school board of which a majority are Indians.[38]

No funds from any grant or contract under Title II can be given to a school district unless the Secretary is satisfied that the quality of education, including facilities and services, for Indian students is at least equal to that provided to all other students in the district.[39]

The Act changed the procedures for contracting to assume BIA functions. It did not restructure the BIA nor did it foster Indian control of state public schools. These have been described as the two major flaws in the legislation by proponents of increased support of Indian control of

education. [40]

Chairman Peter MacDonald stated, with regard to the Tribe's relationship with the BIA, that the Tribe needs more involvement in deciding how BIA funds are spent:

> It is the development of the budget and the allocation of fiscal resources which in the long run, more than anything else, will determine the degree to which Indian tribes control their destination . . . [t]o focus on contracting alone, a consideration which occurs only after the budget has been determined, is to literally miss the forest for the trees in the context of self-determination. . . .[41]

Indian Education Act
P.L. 92-318, §421 (1972)
20 U.S.C. §3385 (Supp. II, 1978)

P.L. 92-318 gave impetus to the movement for Indian community control of education. It authorized funds for a series of new programs in elementary, secondary, and higher education.

The Act increased the control of Indian parents and the Indian community over federal education programs for public schools. Parent committees are given veto power over all proposals submitted for supplemental programs. The parent participation requirements regarding discretionary grants for innovative programs are not as strong: they speak in terms of "adequate participation" by the parents and the tribal communities.[42]

The Act created a new administrative hierarchy within the Department of Health, Education and Welfare (now the Department of Health and Human Services), which includes the Office of Indian Education, a Deputy Commissioner of Indian Education, and a National Advisory Council on Indian Education.

The Council was given a broad charge to represent Indian concerns in implementing the Act. The Council found, however, that it could not act effectively, largely as a result of its difficulties in dealing with the Office of Education.[43]

The Indian Education Act did not address the needs of Indians in BIA schools and did not provide financial assistance to all Indian children in public schools.

Neither the 1972 Indian Education Act nor the 1975 Indian Education Assistance Act provided for Indian control of anything other than the federal funds which public schools send; and these funds represent only a part of the funds available to public schools. Thus, the Indian committees established under the two Acts cannot directly affect all school policies and procedures. Neither Act gave Indians the authority to control public school boards or administrative staffs.

Indian Reorganization Act
ch. 576, 48 Stat. 984 (1934)
included in 25 U.S.C. §§461-479 (1976).

Congress passed the Indian Reorganization Act (Wheeler-Howard Act) of 1934 to give Indians the right of self-government, or, perhaps more accurately, to impose upon Indians Congress' concept of Indian self-government.

The Act was part of a Congressional effort to do away with the BIA, as stated by Senator Wheeler in recommending the bill to the Senate.[44] It provided for the adoption of tribal constitutions but gave the Secretary of the Interior veto power over them and over tribal attorney contracts.

The Act allows tribes to accept or reject its application to them by majority vote of adult tribal members. The Navajo and 76 other tribes rejected it; 181 tribes accepted it.

The Indian Reorganization Act also formalized the government's policy of supporting undergraduate and graduate education for Indians. It set aside a small amount of money for loans to Indians who wished to attend non-governmental vocational, trade, and high schools as well as colleges and universities.[45]

Johnson - O'Malley Act, as amended
P.L. 93-638,
25 U.S.C. §450 (1976).

The Johnson - O'Malley Act (JOM) authorized the Secretary of Interior to contract wth states for the education of Indians. It was amended in 1936 to authorize the Secretary to contract with any appropriate private as well as public body.

The Act's intent, according to both the House and Senate reports, was to move Indians into public schools and out of BIA schools.[46] The Act thereby sanctioned the BIA's policy of gradually turning over its education function to the public schools.

The JOM Act also facilitated contracting by making contracts negotiable at the state level rather than the local. It has been one of the primary mechanisms for federal support of Indian education.

The apparent failure of JOM to substantially improve the education offered to Indian students was examined by the Kenndy Commission. The Commission found that the problem was narrow interpretation of the Act's language, stifling the intent of the legislation.

For example, the BIA adopted a more restrictive eligibility requirement than that specified in the Act, and public school districts have traditionally used JOM money to supplement their general operating budget, thus benefiting all

their students rather than just their Indian students, despite the expressed intent of the Act to assist only Indian students.[47]

The Kennedy Commission Report noted several significant problems in the implementation of the Johnson - O"Malley Act:

1. Overlap with P.L. 81-874. P.L. 81-874 and JOM money were often paid to the same school for the same purpose: compensating school districts for expenses in educating large numbers of Indian children.

2. Exclusion of many Indians. As administered by BIA, Johnson - O"Malley excluded from eligibility Indians who had left the reservation. Most urban school districts were not eligible for either JOM or P.L. 81-874 because the Indian parents did not live or work on reservations.

3. Poor accountability. There was little accountability for the JOM funds administered and little effort to document the effect, if any, of JOM programs in particular school districts.

4. Lack of Indian participation. At the time of the Kennedy Commission Report, Indians rarely had an opportunity to decide how JOM monies should be spent.[48]

Federally Impacted Areas Act
P.L. 81-874 (1950)
20 U.S.C. §§236-244 (Supp. II, 1978)

P.L. 81-874 gives public school districts funds for general operating expenses. It provides money to school districts which lose tax revenue because of the presence of

federal property and is thus regarded as "in lieu of taxes" legislation.

"Federal property" was interpreted from the law's inception as including Indian reservations, but because many public schools educating Indians were using Johnson - O'Malley money for general operations, Indians were excluded from the Acts's provisions until 1958. The distinction was then made that JOM funds were to be used for special services for Indian students, and impact aid funds were to be used for educational services.

Congress allowed this dual funding because it recognized a difference between general educational support in lieu of taxes and special program support designed to meet the special needs of particular students.

School Facilities Construction Act
P.L. 81-815 (1950)
20 U.S.C. §§236-244 (Supp. II, 1971)

P.L. 81-815 encouraged the transfer of Indian students from federal schools to public schools by authorizing federal financial assistance for construction of public schools which Indians attended. The Act provided for payments to school districts for sudden and substantial increases in school enrollment of children as a result of federal installations.

Initially, the Act contained no specific provisions for

assisting school districts educating children living on Indian lands. Indian reservations were included, though, under the definition of "federal property."

In 1953, a provision (Section 14) was added specifically including Indians under the Act's jurisdiction.[49] It addressed the problem of large numbers of children not attending public schools because no facilities were available to them, rather than the problem of large increases in enrollment. This amendment was intended to provide facilities to school districts which did not qualify under the Act's eligibility provisions, because they were not burdened with the substantial increases that occurred around military and other federal installations.[50]

Funds are granted under Section 14 for construction of minimum school facilities for Indian students, when the district has neither bonding capacity nor other resources sufficient to construct the needed facilities. Thus, Section 14 provides funds for facilities in districts where the immunity of Indian land from taxation impairs the ability of the public school district to finance necessary construction.

By the early 1970's P.L. 81-815 funds for construction of new schools were generally no longer available.

Bilingual Education Act
P.L. 89-10, Title VII, amended by P.L. 95-561
20 U.S.C. 3221-3261 (Supp. II, 1978)

The Bilingual Education Act was passed to demonstrate methods for providing children of limited English proficiency with instruction in their native language that would enable them to achieve competence in English. It excluded from federal funding non-bilingual teaching methods for such children.

The funds provided under the Act may be used for a variety of specified purposes related to the development of bilingual education programs. Eligible grantees include local education agencies, states, private non-profit organizations, and organizations of an Indian tribe that operate an elementary or secondary school on the reservation.

The Department of Education's regulations implementing this Act appear at 45 C.F.R. Part 123, "Grants for Bilingual Education Programs."

In February, 1981, Secretary of Education Bell announced that proposed new federal regulations requiring bilingual education were being withdrawn. This was seen as a demonstration of the Reagan Administration's opposition to federal requirements for bilingual education. Despite this, however, new regulations minimizing the federal role in bilingual education have not been issued, and the so-called Lau Remedies apparently remain effective.[51]

Indian Civil Rights Act
P.L. 90-284 (1968)
25 U.S.C. §§1301-1341 (1976)

Congress first enacted legislation specifically imposing restraints on the operations of tribal government in the 1968 Indian Civil Rights Act.[52] The Act prohibits a tribal government from denying "equal protection of its laws" and from depriving any person within its jurisdiction "of liberty or property without due process of law."[53]

The Act is modeled on the U.S. Constitution's Bill of Rights, but differs from the Bill of Rights in several respects, including the absence of any prohibition of the establishment of religion.

Although a few courts have held that the Act simply made the U.S. Bill of Rights applicable to the tribes, most cases have held that the Act does not apply all federal constitutional law to the tribes. The weight of judicial opinion is that the actions of tribal governments must still be measured in light of tribal practices. Thus, variations from the requirements of federal constitutional law have been upheld in a number of cases.

Education: Types of Schools
62 Bureau of Indian Affairs Manual 2.0

The BIA Manual's section on education includes a subsection concerning types of schools at 62 BIAM 2.0.

It is official BIA policy to emphasize attendance at day schools to keep Indian children at home as long as possible. BIA personnel are not to encourage enrollment of Indian children in boarding schools where day schools are available, and the child has a home.

BIA schools are maintained only to the extent that there are no available local public schools or tribally-operated schools. Enrollment in BIA schools is not available where there are other appropriate public school facilities available.

It is general BIA policy to educate students as close to home as possible. Students shall not be enrolled in schools outside of their attendance boundary unless no school exists within the boundary having a program and space to meet the student's needs.

The Manual sets out BIA's education and social criteria for admission to boarding schools. Boarding schools are used to educate (a) those who have no other means of attending school, (b) those whose educational needs cannot be met by the schools available to them, and (c) those who require care away from home even though other schools may be available to them.

Contract schools, outside of the state's public school system, can (1) permit the development of programs for students which might not be possible in public schools and (2) enable the tribe to gain experience in management and decision-making.

The Manual states that contract schools also have disadvantages: (1) dependence on specific federal funding and the inability to take advantage of all state and federal resources, and (2) withdrawal from the political processes affecting education within the states and counties. A contract school is considered a federal school for purposes of eligibility for funds under P.L. 93-380.

"Wherever public school opportunties may be made available within reasonable transporting distance of Indian homes, every effort shall be made to encourage the enrollment of students in these schools."[54] The transfer of responsibility for the education of Indian students to public schools should be accomplished wherever such a transfer will mutually benefit the Indians, the state, and BIA.

The responsibility of the BIA to Indians not now served by BIA schools is to perform the role of advocate. This involves working with Indians, private and public schools, and state departments of education so that non-federal educational programs will more adequately serve Indian students.

If serious deficiencies persist in the local public

schools' ability to meet the educational needs of Indians, the BIA will assist in developing alternative schools or school programs within the public school system. These programs should be designed to supplement the regular school program, rather than to isolate the student and make his return to the regular school programs more difficult.

If the "unusual" circumstances specified in 62 BIAM 2.7 c.1 exist, the BIA "will consider" assuming responsibility for the education of students attending public schools, if requested to do so by parental referendum and Tribal Council resolution.

President Nixon's Message to Congress on Indian Affairs
H.R. Doc. No. 363, 91st Cong., 2d Sess. 6 (1970)

On July 8, 1970, President Nixon declared, "[W]e believe every Indian community wishing to do so should be able to control its own Indian schools."[55] The President continued,

> Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[56]

The President rejected the concept of termination, saying "[W]e must make it clear that Indians can become independent of federal control without being cut off from federal concern

and federal support."[57] A method was needed by which Indians could manage their own federal programs, including education. The President noted with favor the development of Indian controlled contract schools, including Ramah and Rough Rock.

Kennedy Commission Report
S. Rep. No. 501, 91st Cong., 1st Sess. (1969)

In 1969 the Senate's Special Subcommittee on Indian Education presented a report entitled "Indian Education: A National Tragedy - A National Challenge." The report presented evidence of the failure of federal Indian education policy and recommendations for improving the education of American Indians.

A theme of all its recommendations was increased Indian participation and control of education programs. The report criticized both state public schools and Bureau of Indian Affairs schools, noting that it had long been assumed that public schools, with their integrated settings, were the best means of educating Indians. The Subcommittee's findings of inadequacies in public school Indian education raised serious doubts about that assumption.[58]

The Subcommittee recommended programs to meet a number of special, unmet needs in Indian education. The Subcommittee

focused on the "organization problem," the internal organization of the BIA and the location of the BIA within the federal establishment, but made no final recommendation on this issue.

Although clearly a document of major importance, the Kennedy Commission Report had no legal force. Its ultimate importance lies in its impact on legislation, particularly the Indian Education Act of 1972 and the Indian Self-Determination and Education and Assistance Act of 1975.

B. NAVAJO LAW

Treaty of 1868
15 Stat. 667, 669

The Treaty of 1868 between the United States and the Navajo Tribe established the obligation of the United States to provide teachers and other educational services to the Navajo for an unspecified period of time.

Article VI of the Treaty included the provisions:

> In order to insure the civilization of the Indian's entering into this Treaty, the necessity of education is admitted, . . . and it is hereby made the duty of the agent for said Indians to see that this . . . is complied with; and the United States agrees that, for every thirty children . . . a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as teacher. . .[59]

Navajo Education Policy

Tribal Council Resolution CAU 43-61 (1961).

In a joint Policy Statement, the BIA and the Navajo Tribal Council outlined Navajo education policy in 1961. The "ultimate education objective" was stated as "educational competency for all Navajo people so that they may participate in the local community, State and national life equally with other citizens."

Although the Navajo Division of Education and others have suggested changes in the policy statement, the Tribal Council has not acted to change the 1961 Statement.

Among the policy objectives listed were the following:

1. to keep children near their parents, in keeping with the pattern of public education in the United States;
2. to develop, "when there is mutual readiness", educational opportunities in public schools for Navajo children to participate in programs on an equal basis with other citizens;
3. to use existing off-reservation facilities as long as needed; and
4. to provide adult education in "close cooperation with local community groups."

The Policy Statement declares that Navajo students will attend schools on the reservation (a) in public schools

wherever they are available; (b) in federal day schools wherever population will support a day operation ("the value attached to home living with school attendance on a day basis remains a primary objective of tribal and Bureau education policy"); and (c) in existing boarding schools to the extent that day schools cannot accommodate all students. Existing boarding schools will be expanded at the nearest location to the parents. Students who can attend on a day basis will do so.

Navajo students may attend off-reservation schools under the following considerations: (a) if they are "up to grade" they may attend public schools and the BIA will assure dormitory care; (b) Navajo children 13 years of age or older who are two or more grades behind may continue to attend off-reservation federal schools for special vocational instruction; and (c) Navajo students 13 years of age or older who cannot be accommodated in reservation schools will continue to attend off-reservation schools.

The Policy Statement also addressed post-secondary education, adult education, and special education.

Policy Planning
10 N.T.C. § 1-5

Section 1 of Title 10 of the Navajo Tribal Code states: "An educational system shall be put into operation on the Navajo Reservation that will meet the requirements of the accredited systems of the States of the Union."

Section 2 states that it is the policy of the Tribe that any group planning a new school or any change in a school operation or policy will be requested and urged to consult with the Tribe for full discussion of any proposed changes. Any group proposing a change is also advised to discuss its plans with the BIA at the agency or sub-agency level, the Education Committee of the Tribal Council, local chapter offices, and the people of the communities to be affected. The Tribe will withhold its endorsement of any changes until the group has made every effort to obtain the approval of the people affected. Tribal endorsement of plans or changes must be obtained prior to implementation.

Section 3 approves the use of funds appropriated for educational purposes under the Long-Range Program in constructing dormitories and in expanding and equipping public schools in communities peripheral to the reservation.

Section 4 states that the Education Committee will work closely with the BIA concerning the size and location of all educational facilities to be constructed for Navajo

students. The Advisory Committeee of the Tribal Council is authorized to approve site locations on the reservation for any facility.

Section 5 declares that tribal policy is to provide for the operation and maintenance of vocational training facilities to qualify Navajo workmen for jobs above that of common laborer.

School Boards
10 N.T.C. § 201-305

Chapter 3 of the Navajo Tribal Code deals with schools boards. Subchapter 1 authorizes the local chapters of the Tribe to establish local community school boards. It establishes membership and composition requirements for local school boards and procedures for election of their members. It also sets forth the powers, authority, and duties of the boards.

Subchapter 3 authorizes tribal chapters to establish agency school boards. It sets forth the board's composition, powers and duties, officials; and meeting schedule.

Subchapter 5 provides for the establishment of an inter-agency school board by the agency school boards. It sets forth the membership; the powers and duties; the offices; the meeting schedule; and the funding of the inter-agency school board.

School Attendance
10 N.T.C. § 501-504

Chapter 5 of the Navajo Tribal Code addresses school attendance. Section 501 provides for an annual enrollment and school attendance drive.

Section 502 states that "education in the Navajo schools shall be compulsory as to children between the ages of 6 and 16."

Section 503 states that the Tribal Council consents to the application of state compulsory school attendance laws to the Navajos on the Reservation wherever an established public school district lies or extends within the Reservation. The Education Committee of the Tribal Council is directed to develop plans and procedures for enforcement of the compulsory attendance laws, in Section 504.

Land for School Sites
10 N.T.C. § 1201-1202.

Land for school sites is the subject of Chapter 11 of the Tribal Code. Section 1201 gives the Advisory Committee of the Tribal Council full authority to withdraw tribal land and to issue leases and permits for the use of such land for schools.

Section 1202 states that no rent will be charged for withdrawals, permits, or leases of tax-exempt tribal land used primarily for school or other legitimate educational purposes, in consideration of the tax-exempt status of the tribal land.

Adult Education Program
10 N.T.C. § 1401-1407

A Navajo Adult Education Board is to be established including specified tribal and non-tribal officials. This Board shall develop a plan for an adult education program to be conducted for Navajos residing on or near the reservation. Instruction shall be provided in chapter houses or other convenient accommodations. Courses shall be free of charge except where materials are requried and sufficient funds are not available.

Community College
10 N.T.C. § 2001-2063

The Tribal Council grants a charter to the Navajo Community College to operate on the reservation and award the associate degree and other certificates of achievement as deemed appropriate by the Board of Regents of the college.

Subchapter 1 deals generally with the powers and authority of the Community College.

Subchapter 3 deals with the organization of the Board of Regents.

STATE LAW

The states of Arizona, New Mexico, and Utah have enacted comprehensive statutory programs for state public schools.[60] These are not summarized here, but will be considered, as appropriate, in subsequent sections of this report. The statutory provisions identified here are those specifically addressing Indians.

New Mexico has established an Indian education division within the State Department of Education. This division provides technical assitance and advice to local school districts to help them meet the educational needs of Indian students.[61] New Mexico has also established an Advisory Council on Indian Education to advise the State Board of Education in efforts to improve the quality of education for Indian students in public schools.

Arizona has a Commission of Indian Affairs and Utah a Board of Indian Affairs to deal with general issues and problems affecting Indian citizens of those states.[62]

Statutes in Utah and Arizona specifically authorize the state boards of education to enter into contracts with the U.S. Department of the Interior for receipt of Johnson-O'Malley funds.[63] An attorney general's opinion in Arizona allows individual school districts to receive Johnson-O'Malley payments directly from the Bureau of Indian Affairs, rather

that through the state board of education.[64]

New Mexico has provided by statute for bilingual multicultural education programs.[65] The New Mexico statute requires that each school district establish a bilingual instruction program aimed at students in grades K-3 before addressing the needs of students in higher grade levels. Programs are required to use two languages in instruction for any part or all of the curriculum and to use teachers who have received special training in bilingual education. The statute requires that programs "emphasize the history and cultures associated with the students' mother tongue."

Utah enacted a statute creating a bilingual education program in 1977, and the State Board of Education has adopted Standards and Guidelines for Bilingual Education.[66] For students whose first language is not English, teaching should be entirely in the first language until "sufficient facility" is achieved in both languages. A State Advisory Committee for Bilingual Education is in charge of the program, subject to Board standards and guidelines.

The constitutions of each of the three states prohibit state taxation of Indian reservation land. See for example, Article III, Section 2 of the Utah Constitution: "Indian lands shall remain under the absolute jurisdiction and control of the Congress."

The states have enacted limitations on state authority

regarding Indian property and Indian rights to hunt, trap, or fish. Utah explicitly grants full force and effect in the determination of civil suits to any tribal ordinance or custom not inconsistent with state law.[67]

APPENDIX A

STATUTES, REGULATIONS, AND RESOLUTIONS GOVERNING NAVAJO EDUCATION

The following is a list of the federal, state, and Navajo official enactments governing the education of Navajo children. The federal citations are in reverse chronological order, the most recent citations listed first.

FEDERAL

Education Amendments of 1978, P.L. 95-561, Title XI (1978), 20 U.S.C. §§3385, 3385a, 3385b and 3386 (Supp. II, 1978); 25 U.S.C. §§2001-2019 (Supp. III, 1979).

Indian Self-Determination and Education Assistance Act, P.L. 93-638 (1975), 25 U.S.C. §§450-450n, 452, 455-458e (1976).

Bilingual Education Act, P.L. 95-561, Title VII (1978), 20 U.S.C. §§3221-3261 (Supp. II, 1978).

Indian Education Act, P.L. 92-318, §421 (1972), 20 U.S.C. §3385 (Supp. II, 1978), amending 20 U.S.C. §§2411-m (1976).

Indian Civil Rights Act, P.L. 90-284 (1968), 25 U.S.C. §§1301-1341 (1976).

Elementary and Secondary Education Act, Title I, P.L. 89-10 (1965) 20 U.S.C. §§241a-m (Supp. II, 1978), amending 20 U.S.C. §§2411-m (1976).

Federally Impacted Areas Act, P.L. 81-874 (1950), 20 U.S.C. §§631-637 (Supp. II, 1978), amending 20 U.S.C. §§236-244 (1976).

School Facilities Construction Act, P.L. 81-815 (1950), 20 U.S.C. §§236-244 (Supp. II, 1978), amending 20 U.S.C. §§236-244 (1976).

Johnson-O'Malley Act, 48 Stat. 596 (1934), as amended, P.L. 93-638 (1975), 25 U.S.C. §450 (1976).

Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934), in 25 U.S.C. §§461-479 (1976).

Snyder Act, P.L. 67-85 (1921), as amended by P.L. 94-482, Title IV, §410, 25 U.S.C. 13.

Regulations:

25 C.F.R. §§31-35, and 271.

25 C.F.R. §31e, Standard Education (Draft), August 14, 1981.

34 C.F.R. §223, Special Impact Aid Provisions for Local Educational Agencies that Claim Entitlement Based on the Number of Children Residing on Indian Lands, p. 7200, Federal Register, January 22, 1981.

34 C.F.R. §250, Indian Education Act Regulations, p. 34152, Federal Register, May 21, 1980 (as 45 C.F.R. §§186-188).

34 C.F.R. §§500-527, Office of Bilingual Education, Federal Register, April 4, 1980 (as 45 C.F.R. §123).

25 C.F.R. §31g, Education Personnel, p. 65008, Federal Register, November 8, 1979.

25 C.F.R. §31a, Indian Education Policies, p. 58096, Federal Register, October 9, 1979.

25 C.F.R. §31b, Transfer of Indian Education Functions, p. 58101, Federal Register, October 9, 1979.

Bureau of Indian Affairs Manual, 62 BIAM 2.0, Types of Schools.

34 C.F.R. §222, Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education, p. 16032, Federal Register, April 8, 1975 (as 45 C.F.R. §115).

ARIZONA

Title 15 ARSA, Education

15-1161 ARSA, Education of Indians in State Schools; contracts with Department of Interior.

§§41- 541 and 542 ARSA, Commission of Indian Affairs.

Arizona Constitution, Article XX, par. 4th and 5th.

NEW MEXICO

Tile 22 NMSA 1978, Public Schools.

§22-2-13 NMSA 1978, Duties and Responsibilities of Indian Education Division.

§§22-23-1 to 22-23-6 NMSA (1978), Bilingual Multicultural Education.

New Mexico Constitution, Article XXI, §2.

Educational Standards for New Mexico Schools, as revised May, 1981, State Board of Education.

Guidelines for Approval of State Programs - Bilingual Education, as revised August, 1979, State Department of Education.

UTAH

Title 53, UCA 1953, Public Schools.

§53-2-33 UCA 1953, Welfare and Education of Indians in Public Schools.

§53-34-2.2 UCA 1953, Definition of resident student.

§63-36-1 UCA 1953, Board of Indian Affairs.

Utah Constitution, Article III, Section 2.

By-laws of Utah State Indain Education Advisory Committee, November 18, 1978, State Board of Education.

Equal Education for Minority Students, as revised September 14, 1978, State Board of Education.

Standards and Guidelines for Bilingual Education, May 18, 1978, State Board of Education.

NAVAJO

Title 10 N.T.C, Education

Treaty of 1868, Article 6, 15 Stat. 667.

APPENDIX B

STATUTES, REGULATIONS, AND RESOLUTIONS PERTAINING TO KEY ISSUES

The following is a list of the federal, state, and Navajo official enactments specifically addressing issues important in the education of Navajo children. The citations pertaining to each issue are in reverse chronological order.

Many statutes, regulations, and resolutions have an impact on most or all of these issues. Provisions that have such broad impact are not identified below under any single issue, but are discussed in Section III of this report.

Bilingualism

25 C.F.R. §31e.37, Standard Education (draft), August 14, 1981.

Bilingual Education Act, P.L. 95-561, Title VII (1978), 20 U.S.C. §§3221-3261 (Supp. II, 1978).

25 C.F.R. 31a.§4(h), Multilingual education, page 58100, Federal Register, October 9, 1979.

34 C.F.R. §§500-527, Office of Bilingual Education, Federal Register, April 4, 1980 (as 45 C.F.R. §123)

§§22-23-1 to 22-23-6 NMSA 1978, Bilingual Multicultural Education.

Guidelines for Approval of State Programs - Bilingual Education, as revised August, 1979, New Mexico State Board of Education.

Ch. 5.1, Educational Standards for New Mexico Schools.

Standards and Guidelines for Bilingual Education, May 19, 1978, Utah State Board of Education.

§§15-1097 and 1098 ARSA, Bilingual Instruction and Special English Training.

§15-202 ARSA, Conducting of public schools in English language; bilingual instruction.

School Accreditation

25 C.F.R. §31e.17, Standard Education (draft) August 14, 1981

25 C.F.R. §31a.4(y), Accreditation, Page 58101, Federal Register, October 9, 1979.

Education Amendments of 1978, P.L. 95-561, Title XI, Section 1121, 25 U.S.C. §2001 (Supp. III, 1979), Standards for the basic education of Indian children in Bureau of Indian Affairs schools.

Ch. 3.1, Educational Standards for New Mexico schools.

Teacher Certification

25 C.F.R. §31e.18, Standard Education (draft) August 14, 1981.

25 C.F.R. §31g, Education Personnel, page 65008, Federal Register, November 8, 1979.

Education Amendments of 1978, P.L. 95-561, Title XI (1978), 20 U.S.C. §2011 (Supp. III, 1979).

§§22-10-1 to 22-10-26 NMSA 1978, Certified School Personnel.

Ch. 2.1, Educational Standards for New Mexico Schools.

§§15-231 to 15-234 ARSA, Certificate and Oath.

§15-268 ARSA, System of Assessment and Evaluation.

§53-2-21 UCA 1953, Teachers, Supervisors and Superintendents to have certificates.

§§53-49-1 to 53-49-3 Interstate Qualifications of Educational Personnel.

Planning

34 C.F.R. §223.10, page 7200, Federal Register, January 22, 1981.

25 C.F.R. §31a.4(g), Tribal rights regarding governing bodies and planning, and (j) Tribal education plans, page 58100, Federal Register, October 9, 1979.

Education Amendments of 1978, P.L. 95-561, Title XI, §1129 (b)(1978), 20 U.S.C. §2009 (Supp. III, 1979).

Indian Self-Determination and Education Assistance Act, P.L. 93-638 (1975), 25 U.S.C. §455 (1976).

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15. Supra note 2, at 106.

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17. Id. at 112-113.

18. 20 U.S.C. § 238 (Supp. II,1978).

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21. Id. at 119.

22. Id. at 120.

23. Id. at 122.

24. 25 C.F.R. §31a.4(a)(3).

25. Id. at §31a.4(a)(2).

26. Id. at §31(a)4.

27. 25 C.F.R. §§31g.4, and 31g.7.

28. 25 U.S.C. §450f(a), 450g(a)(1976).

29. Id. at §450f(b), §450g(b).

30. Id. §450j

31. Id. § 450m.

32. Id. § 450n.

33. Id.§ 455

34. Id. § 456

35. Id.

36. Id. § 455.

37. Id. § 457.

38. Id. § 458.

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41. Chariman Peter MacDonald's Statement to Senate Committee on S. 1017, Hearings on S.1017 [Comm. Print] (1975).

42. P.L. 92-318 §421 (1972), 20 U.S.C. §3385 (Supp. II, 1978), amending 20 U.S.C. §§241a-m (1976).

43. National Advisory Council on Indian Education, Through Education: Self-Determination v (March 1975).

44. Gross, supra note 40 at 1212 n. 72, citing 78 Cong. Rec. 11123 (1934).

45. Included in sections of 25 U.S.C. §§461-479 (1976)

46. H. Report 864, March 2, 1934 and S. Report 511, March 20, 1934.

47. Special Subcomm. on Indian Education, Comm. on Labor and Public Welfare, Indian Education: A National Tragedy - A National Challenge, S. Rep. No. 501, 91st Cong., 1st Sess. 31 (1969).

48. Id. at 40-44.

49. P.L. 82-276 (1953).

50. Special Subcomm., supra note 47 at 33.

51. S. Baker, "The Deregulation That Wasn't," The Washington Post, p. C2, July 19, 1981. The "Lau Remedies" require that most children be taught basic subjects in their native language, at least until they are "fully functional" in English. The Lau Remedies are United States Department of Education guidelines (not regulations) published in 1975, titled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols."

52. 25 U.S.C. § 1302, 1303.

53. Id. at § 1302.

54. 62 BIAM 2.5. This sentence opens a Pandora's box of questions:
    - What is a public school opportunity"?
    - Who, if anyone, will make the opportunities available - BIA, states, school districts, tribes?
    - What is a "reasonable transporting distance"? Is it 25 miles or one hour, as in 62 BIAM 2.7.C.1?
    - Does the reasonableness of the transporting

distance vary with topography, climate, land ownership, or method of transportation?
- Is there really no limit to the effort that must be made to encourage enrollment?
- Who shall make this effort?

55. Message from the President of the United States, H.R. Doc. No. 363, 91st Cong., 2d Sess. 6 (1970).

56. Id.

57. Id.

58. Special Subcomm., supra note 47, at 31.

59. 15 Stat. 667, 669.

60. §§15-101 et seq. ARSA; §§22-1-1 et seq. NMSA 1978; §§53-1-1 et seq. UCA 1953.

61. §22-2-13 NMSA 1978.

62. §41-541 ARSA and §63-36-1 UCA 1953.

63. §15-1161 ARSA and §53-2-33 UCA 1953.

64. Op. Atty. Gen. Ariz. No. 57-127.

65. §22-23-6 NMSA 1978.

66. Utah State Board of Education, "Standards and Guidelines for Bilingual Education", CGN-1, May 19, 1978.

67. §63-36-17 UCA 1953.

PART TWO

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ANALYSIS OF NAVAJO EDUCATION AUTHORITY

PART TWO

Submitted to
The Navajo Nation
Division of Education

I.

INTRODUCTION

This is the second part of a two-part report of legislative authority for Navajo education. The purpose of the report is to help the Navajo people attain meaningful control of the education of their youth, with the continued appropriate involvement of the federal and state governments.

Part One summarized the key provisions of the relevant sources of legal authority which govern Navajo education. It briefly examined the legal status of the Navajo Tribe and presented a detailed compendium of federal, Navajo, and state law regarding education.

Part Two assesses the educational powers and duties of the United States; the states of Arizona, New Mexico, and Utah; and the Navajo Tribe. It examines the roles of each involved party in the context of the three types of schools operating on the Navajo reservation, i.e., state public schools, Bureau of Indian Affairs Schools, and "contract"

schools (mission schools are not pertinent to this analysis of legislative authority.

It then discusses the existing obstacles to and opportunities for expanded tribal authority with regard to several controversial issues: educational standards, school enrollment, and bilingualism.

It concludes by summarizing an institutional arrangement which the Tribe might consider as the formal mechanism for operating a unified Navajo-controlled educational system.

Regardless of the type of arrangement which is endorsed, if a greater measure of self-determination is to be attained, the Tribe must develop and adopt a feasible plan of legal, political, and administrative action. Navajo education policy must be adopted by the representatives of the Navajo people before the federal and state governments will agree to change the educational balance of power.

The Navajo must speak to Congress, the BIA, and the state legislatures with one clear voice.

Building upon the information presented in Part One, this second part outlines the legal framework for tribal action.

II.

POWERS AND DUTIES IN PUBLIC SCHOOLS

The States of Arizona, New Mexico, and Utah are obligated to provide an equal education to all of their citizens. In the landmark case of Brown v. Board of Education, the United States Supreme Court held that "the opportunity of an education. . . , where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 493 (1954).

This requirement imposes on states the duty to provide each child with "equal access to equal educational resources." This does not mean that states must ensure that every child achieves the same level of educational achievement; nor does it mean that states must provide the same education to all children. It does mean that the educational resources made available to particular segments of the student population must be as relevant and valuable to those students as are the resources made available to other students.

States may not avoid, on the basis of the availability of Bureau of Indian Affairs schools, their obligation to provide public education to Navajo children.

In Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926 (1924), it was held that, regardless of the

availability of a BIA school, an Indian child was entitled "to be received as a pupil into the school conducted by the governing body of the school district of which he is a resident and a citizen."

In fulfilling their educational obligations to Navajo students and all other students, state departments of education act as regulators, standard-setters, policy-makers, and planners. The state agencies prescribe required courses, qualifications for teacher certification, and school boundaries. These agencies and the local school boards are constrained in their decision-making authority by the "strings" attached to federal funds and the additional confines of state and federal statutory and constitutional law.

In addition to the duty to provide an equal education to Indian students, public education must meet other legal requirements (in this context the state and the local school boards are considered as one entity). For example, they must provide bilingual and bicultural educational programs in order to receive federal funds. They must allocate federal and state monies fairly within local schools districts. They must provide the benefits of per pupil funds to schools that teach Indians on an equal basis with other schools in a district. They must use federal funds intended for supplemental Indian programs for such programs rather than for basic education or

administration. These obligations have occasionally not been met.

States are not required to spend absolutely equal amounts on all school districts, but they are required to provide equivalent support for all public schools within the state. This has great implications for the Tribe, which must be concerned about the continued funding for Navajo education.

Tribally controlled public schools are more likely to continue receiving necessary funds than are tribally controlled BIA schools. The burden of persuading Washington to appropriate funds for public schools is shared by many, including the powerful national education lobby. Local school districts do not individually have to persuade Congress to support their schools. On the other hand, there is no strong education lobby for BIA schools, which are substantially more susceptible to budget cuts than are public schools.

Most states do not recognize any significant difference between the educational needs of Indians and those of whites. For example, special provisions for teachers and administrators trained in Indian culture are rare; they do not exist in Arizona, New Mexico, or Utah. Certification of individuals recognized by tribes as experts in Indian culture is generally not allowed. There are few Indian studies programs with high Indian enrollment because the programs are usually designed to educate whites rather than Indians.

Explicit statutory limits to state and local school board authority for Indian education in public schools are contained in the Education Amendments of 1978 and the Indian Education Assistance Act of 1975. Those limitations are few and their impact on state and local practices is generally minimal. Among those limits are the following:

1. Policies and procedures to increase participation in education must be established by any local school district which receives P.L. 81-874 payments. Tribes and Indian parents must be involved in the planning and development of 874 applications and programs.
2. Proposed Johnson-O'Malley (JOM) contracts may not be approved unless an educational plan containing objectives which adequately address the educational needs of the affected Indian students is also approved by the Secretary of Interiors.
3. Schools receiving Johnson-O'Malley funds must have parent committees from the local community.
4. Parent committees have veto power over all proposals submitted for supplemental programs under the Indian Education Act of 1972.
5. School districts may not receive funds under any grant or contract for school construction under Part B of the Indian Education Assistance Act unless the education offered Indian students at the school

is at least equal to that offered to all other students in the school district.

The federal government has little direct decision-making authority in public schools. Federal involvement, i.e., federal "strings" attached to funds, can be expected to diminish during the Reagan administration, as the U.S. Department of Education and, perhaps, the Congress move toward withdrawing the federal government from the business of education.

The federal government's role in public education is primarily that of subsidizing state systems. This is particularly true in Indian education. The most important programs for federal financing of Indian education in state schools have been those authorized by the Johnson-O'Malley Act and the "impact aid" of P.L. 81-874.

With federal monies, however, come federal requirements regarding education in general and Indian education in particular. The financing programs' requirements have given the tribes, through the federal government, the little leverage they have enjoyed in public school decision-making. Those requirements do not, however, guarantee an educational environment that is academically or culturally appropriate for Navajo students.

The Navajo presently exercise very little contol over public school education except to the extent that they vote

for school boards, lobby state legislatures, and utilize the power given them by federal statutes to affect the expenditure of Johnson-O'Malley and P.L. 81-874 monies.

They are entitled, in their effort to obtain real authority, to receive assistance from the Bureau of Indian Affairs. Section 1130 of P.L. 95-561 states that the BIA shall "facilitate Indian control of Indian affairs in all matters relating to education," not limiting the BIA's assistance to the federal school environment. Furthermore, the Bureau's regulations under the Act commit the BIA to "serve as an advocate for Indian Tribes . . . in education matters before the Federal, State, and local governments."[1]

With assistance from the BIA, the Tribe may seek to make maximum use of the authority it currently holds in public school education.

Public schools serving children residing on Indian lands must actively consult tribal officials and regularly involve them in the planning and development of educational programs assisted with P.L. 81-874 funds.[2] This provision of Department of Education regulations offers limited support to the Tribe, however, for two reasons: (1) it does not give the Navajo decision-making authority, only the right to be consulted and involved, and (2) it only extends that right to programs funded with impact aid; it does not require school districts to even consult with tribes regarding education programs not funded with P.L. 81-874 monies.

Similar limitations apply to the involvement of Indians in public schools under the 1972 Indian Education Act and the 1975 Indian Education Assistance Act. These statutes offer Indians some control over the federal funds which public schools receive for Indian education, but virtually no control over Indian education in general; this remains with the state agencies and local school boards.

The most practically significant right held by the Navajo with regard to public school education may be the right to vote for members of public school boards. Control of school boards is the only way, short of federal and state legislative changes, that Navajo decision-making authority can be extended beyond the limits of federal funding programs.

Elected school boards have the power to allocate funds, hire and fire school personnel, develop curriculum (in accordance with state requirements), negotiate contracts, and determine the organization of the school district. An informed observer several years ago noted their importance:

> "Indian controlled boards can bring in Indian administrators, Indian teachers, and Indian personnel and can insist upon the development of a curriculum relevant to Indian needs. Even where Indians are not in the majority, it is still possible to bring about change through coalitions with other minority groups. For many communities this is the easiest and most direct path to making public schools responsive to Indian needs."[3]

Local Indian control of public school boards does not, however, overcome the many problems associated with the existing disjointed "system" of Navajo education wherein several different bodies are responsible for the process and quality of education.

If the Navajo Tribe, as a governmental entity, wishes to exercise a more authoritative role in public schools, it must, for now, rely for legal support on a few key grants of authority.

P.L. 93-638 gives the Tribal Council discretion in permitting a pre-existing local committee to serve as the parent committee for a public school district receiving JOM funds. This grant of discretion implies that the Tribal Council also has authority to withdraw its permissiom for such a pre-existing committee to represent the parents of the Indian children enrolled in the school or schools affected. If tribal policy conflicts with the policy of the sitting local Indian committee, the tribe has the option of calling for an election of a new committee by the parents of the Indian students. Political considerations may render this option valueless.

Where Navajo students attend public schools built in whole or in part with JOM funds, the school must agree, in the construction contract, to provide Indian students with "standards of education" not less than those provided non-

Indian students elsewhere in the school district. If the Tribe believes that this contractual provision is not being met by a particular school district, the Tribe may seek to have it enforced and the funds withheld. To demonstrate that the provision is not being met, however, the Tribe must carefully monitor the "standards of education" provided throughout the school district and be prepared to document alleged inequities. This will be difficult and expensive to accomplish.

The Tribe may more effectively enforce this provision proactively through its consultation with the Secretary, which is mandated to occur prior to any contract, by negotiating specific assurances from the school board of acceptable standards of education.

Another potential lever of tribal power is the requirement of P.L. 92-318 that "tribal communities," as well as Indian parents, must be allowed "adequate participation" in the planning and development of projects funded with discretionary monies under that Act. This does not confer upon the tribe the power to veto decisions, but it does ensure that the tribe has an opportunity to voice its concerns regarding proposed programs, as "tribal communites" arguably inlcudes the tribal government.

Similarly, Title XI, Part A of P.L. 95-561 requires that tribes be involved in developing programs funded with impact

aid. The tribe is not given veto or even voting power.

Although they may find no practical use for it, tribes do have the right to deny state educational jurisdiction on their reservations. Under 25 U.S.C. §231, the Secretary of the Interior cannot permit a state to enter a reservation to enforce its compulsory school attendance laws against Indians If the Navajo Tribal Council were to repeal 10 N.T.C. §503, Navajo children could no longer be legally required to attend state public schools.

Do states have the right to establish public schools exclusively for Indians? Most state education codes either permit or encourage the formation of new school districts. They also generally require that any new district be financially able to support its responsibilities. Arizona, for example, requires that "the real property valuation per child must be sufficient to support the school in a manner comparable to other districts of similar size."[5]

The tax exempt status of Indian reservation lands apparently precludes reservations from meeting this property valuation requirement. It can be argued, however, that federal impact aid should be considered revenue in lieu of property taxes. It can also be argued that the requirement that a proposed new school district be capable of supporting itself through taxes on real estate is unconstitutional in its operation. Such a requirement arguably grossly discriminates

against Indian communities because of the non-taxable status of Indian land.

It has been suggested that the most effective and efficient method for changing state legislation to permit the creation of school districts coterminus with Indian communities might be to request an opinion from the state attorney general on the validity of the real property requirements as applied to the Indian communities. If that opinion is favorable it might persuade a state board of education to approve a proposed new school district. Of course, any proposal to realign public school boundaries to coincide with Indian reservations faces serious equal protection problems.

III.

POWERS AND DUTIES IN BIA SCHOOLS

Congress charged the federal Commissioner of Indian Affairs in 1832 with the responsibility of managing all Indian affairs.[5] Since that delegation of authority, federal Indian policy has taken many turns, sometimes at the direction of Congress, sometimes simply by administrative decision of the Bureau of Indian Affairs.

Although the BIA today remains responsible for the management of the federal government's Indian affairs, Congress has served notice to the Bureau that it must implement the policy of self-determination for Indians. If Congress has its way, the Bureau's power to control the education of Navajo children will give way to tribal and community power.

As noted in the previous section of this report, Congress directed the BIA, in P.L. 95-561, to "facilitate Indian control of Indian affairs in all matters relating to education." This is the cornerstone of the Navajo Tribe's right to obtain educational self-government.

The Bureau took the first step toward implementation of Congress' mandate by adopting regulations that, on their face,

grant to Indian tribes virtual autonomy in education. The regulations state the Bureau's duty:

> Ensure that Indian tribes. . .fully exercise self-determination and control in planning, priority setting, development, management, operation, staffing and evaluation in all aspects of the education process. (emphasis added)[6]

Although such terms as "planning" and "development" have broad, unspecific meanings, this provision must nevertheless be regarded as a clear declaration that tribes are to make the important decisions concerning the education of their children.

Did the BIA, with this provision, turn over essential control of Indian education to the tribes?

The language of the quoted statement clearly suggests an affirmative answer. However, the immediately preceding provision in the BIA's regulations, also setting forth the Bureau's duty, suggests otherwise:

> Be guided in policy formulation and funding priorities, including the proposing and awarding of contracts and grants, by periodic and systematic consulation with governing bodies of tribes . . .[7]

It should be noted initially that this provision does not explicitly refer to establishing budget priorities, but merely to the awarding of contracts and grants. If the tribes do not play a major role in determining BIA's educational budget, they may not be able to significantly affect the implementation of education policy. If "funding priorities"

is meant to include budget development, this should be clarified.

The two quoted provisions are difficult to reconcile. The second implies that it is the BIA which will make policy and funding decisions, with guidance from the tribes. The first implies that the tribes themselves will make the important educational decisions, with assistance from the BIA.

It may be argued that the two provisions address different aspects of educational decision making: on one hand, "policy formulation and funding priorties", and on the other, "planning, priority setting, development, management, operations, staffing and evaluation."

What, however, is policy formulation if not planning and priority setting? Do the priorities which the tribes are to set not include those for funding? These lines are so fine as to be meaningless.

When taken together, the two provisions can only mean that the Bureau of Indian Affairs is to assist the tribes in attaining control of all aspects of education and to defer to tribal decision-making authority when that authority is exercised. There is certainly no indication in the statute or the legislative history that Congress intended to distinguish budget priorities from other priorities. The undeniable intent of P.L. 95-561 is to require the BIA to transfer to the tribes meaningful decision-making authority. So long as the

Bureau continues to set the priorities and formulate the policies for Indian education, tribal authority will not be meaningful.

The Navajo Tribe should urge the Bureau of Indian Affairs and Congress to clarify the underlying contradiction between these two provisions of the BIA's regulations. There is no reason, and there is no legislative support, for any qualification or limitation to the tribal right to self-determination and control in Indian education. Though the second quoted provision offers only minimal support for any Bureau reluctance to "facilitate Indian control", it should be eliminated or clarified to ensure that the Bureau understands and accepts its proper role in Indian education. The question, simply, is who shall decide and who shall guide.

The Tribe's authority to decide matters pertaining to education extends, by the terms of the regulation quoted first above, to planning, priority setting, development, management, operation, staffing, and evaluation. Not only is the Tribe authorized to exercise control in these areas, but the Bureau of Indian Affirs is to ensure that the Tribe does so. This provision and the statutory basis for it, Section §1130 of P.L. 95-561, provide all the authority the Navajo Tribe needs to make and enforce most of the significant decisions regarding education in BIA schools.

If the Tribe fully exercises the power it has been

granted, it can assume full control of the education provided in federal schools and utilize the Bureau of Indian Affairs for guidance and for funding. The necessary institutional capability to actively assume such control may not exist at the present time, but the necessary authority does.

The Tribe must, however, share its authority with local Indian school boards. In granting Indians control over education, Congress and the Bureau divided power between the tribes and local communities.

The regulations implementing P.L. 95-561 direct that each agency or local school board shall function as the policy-making body for the school, consistent with the authority granted by the tribe. Thus, federal policy encourages the establishment of an educational system wherein the tribe exercises powers similar to those held by state departments of education (limited somewhat by retained Bureau authority) and local school boards act as do the boards of public school districts.

It remains for the Navajo Tribe and local school boards to develop effective working relationships.

The Bureau of Indian Affairs is responsible for assisting the Tribe in developing a tribal eductional system, under the terms of the Bureau's regulations. Despite the Congressional directive to facilitate Indian control of Indian education, the Bureau must and will continue to play a major role in the

education provided in what are now federal schools. Bureau (or federal) funding and technical assistance will be necessary. The Bureau's perception of its proper role in the transition to Navajo control of education may not conform, however, to the Tribe's perception of an appropriate role for the Bureau.

In the regulations supporting P.L. 95-561, the Bureau's Office of Indian Education Programs defines its mission as: "To provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being. . ."[8] It may be significant that OIEP believes its mission is the direct provision of education to children, rather than, for example, the furtherance of the tribes' capabilities to provide such education. The mission statement does not contemplate even joint Bureau-tribal responsibility for Indian education. If the words of the statement indicate intent, the Bureau would determine the tribe's needs and educate the tribe's children accordingly.

This conflicts with the BIA's avowed policy of ensuring that tribes "fully exercise self-determination and control. . . in all aspects of the education process." So long as the mission statement, which is promulgated as a regulation, omits any reference to tribal self-determination or to the Bureau's responsibility for furthering self-determination, Bureau

personnel may understandably consider themselves authorized to direct the educational systems on Indian reservations.

Continued BIA control of a specific aspect of education is endorsed in regulations. The Bureau is to "provide for a comprehensive multicultural and multilingual educational program" and to produce and use appropriate instructional material which tribes "may utilize at their discretion." The tribes are not explicitly authorized to participate in the development of the program or materials. If the Bureau develops unsatisfactory materials, the tribes' recourse is to not utilize them.

Although it is quite likely that in many areas, the Bureau will, in fact, actively seek tribal participation in the development of multicultural and multilingual programs, Bureau officials are not required to do so.

Further evidence of the Bureau's intentions as to its role may lie in the content and in the very existence of the Bureau-developed education standards which are discussed in Section V below. The Navajo Tribe can realize its own intentions, however, by exercising the right, conferred in §1121(d) of P.L. 95-561, to waive the basic education standards established by the BIA if the Tribe deems those standards to be "inappropriate or ill-conceived."

This provision gives the Tribe, for the first time, authority to dictate what standards will govern the education

of Navajo children. The Tribe's authority is not absolute: the Secretary of Interior may reject the Tribe's revised standards.

Another potential restriction or limitation upon tribal power in this regard may be found in the wording of the BIA's basic education standards. Section 31e.7(b) of the draft "Part 31e-Standards-Education," provides that a tribe may waive or revise the standards established by the BIA if the tribe finds them to be "inappropriate." The BIA does not also provide for tribal waiver if a standard is "ill-conceived," as does P.L. 95-561.

This may be an inadvertent ommission. In any case, it must be corrected. The BIA is not authorized to change the clear language of a statute. This change could conceivably be important; a standard which is appropriate could nevertheless be poorly conceived and substantially improved by different wording.

IV.

POWERS AND DUTIES IN CONTRACT SCHOOLS

The most important provision in federal Indian education legislation may be the requirement that the government contract with a tribe for the operation of education programs upon the tribe's request.

Under P.L. 93-638, a proper tribal request can be denied, but only if the government specifically cites one of the reasons for denial included in the statute. If the government does deny a requested contract, it must provide assistance to the tribe to help it overcome the problems which caused the denial.

The Secretary of Interior retains the power to negotiate specific contract terms. Even where there is no justifiable reason for denying a Tribe's request to contract, the Secretary may use his right to deny as a means of obtaining contract terms desired by the government.

The government may rescind an existing contract and resume control of a program, upon a finding by the Secretary that the welfare of any person is endangered or that the tribe exhibits gross negligence or mismanagement in the use of the funds provided under the contract.

Thus, the Tribe may achieve self-determination through

contracting only with the continued assistance, cooperation, and understanding of the Secretary of the Interior.

The Tribe's autonomy is further limited by the rights of local Indian communities. One such right may be that of directly contracting with the BIA to operate and administer a school program.

It is not clear whether Indian groups other than tribes are precluded from contracting with the government. P.L. 93-638 did not repeal federal contracting authority under the Buy Indian Act or the Johnson-O'Malley Act, which do not require that a tribe be the contracting party. These two laws established a discretionary process for contracting by any Indian group. Groups that contracted for a school program directly with the BIA are, of course, vested with contractual authority which the tribe may not restrict.

The BIA interprets P.L. 93-638 to require that all new contracting requests come from a tribe. However, there is no provision in the law to that effect.

It is possible, therefore, that two forms of contracts are legally permissible today: those requested by Tribes and those requested by other Indian groups. Contracts requested by tribes must generally be executed as discussed above. Contracts requested by other Indian groups are entirely discretionary with the BIA; that is, there is no presumption of need underlying their requests, and the requesting group

must convince the Bureau of the merits of its proposal.[9]

Educational standards for contract schools have been the focal point of much controversy. The standards developed by the BIA for application in Bureau schools may apply in tribally-owned contract schools at the option of the contract schools' boards. The boards have the right to receive assistance from the Bureau in implementing the Bureau's standards. They may also reject such standards, in part or in whole, and the Bureau may not use such rejection as the basis for refusing to enter into a contract with a school.

The Contract schools now operating are essentially independent entities. To a great extent, they control their own destinies. None of the scenarios considered in this report would change their independent status.

V.

ISSUES IN NAVAJO EDUCATION:
Obstacles and Opportunities

Self-determination in education is a laudable goal for the Navajo Tribe. Without reference to specific elements of the educational process, however, it has little meaning. The Tribe must obtain, utilize, and be acknowledged by the states and the Bureau of Indian Affairs to possess, specific legal authority to render the ultimate decisions in diverse, controversial educational issues.

The tribe is currently faced with both obstacles to and opportunities for attaining the authority it requires. This section of this Report examines the legal status quo and its implication in regard several of the most important and controversial areas in Navajo education: educational standards, school enrollment, and bilingualism.

Education Standards

The Navajo Tribe has the statutory right to waive or revise the educational standards developed by the Bureau of Indian Affairs. The Tribe may delegate this right to a local school board or exercise the right itself. In either case, revised standards may be rejected by the Secretary of Interior for "good cause."

In large measure, then, the Tribe is given the power under P.L. 95-561 to develop its own educational standards. It must use the standards developed by the Bureau as a foundation, but clearly Congress intended the Tribe to exercise great freedom in adapting the BIA-developed standards to tribal needs. This is evident from the limited constraint placed by the Congress upon tribal authority to waive or revise the standards: tribes may waive standards which they deem to be "inappropriate or ill-conceived" (the BIA's ommission of "ill-conceived" can have no effect, as explained in Section III). Tribes are authorized to revise standards "to take into account the specific needs of the Tribe's children."

In light of such minimal conditions on tribal waiver and revision, Congress must be considered to have intended Tribes to freely utilize the authority given them.

It should be noted that the Secretary's authority to reject for cause revised standards does not apply to waived standards. If a tribe waives a standard, in part or in whole, that waiver is effective regardless of any action by the Secretary. Thus, if the Tribe were to waive a particular section or sub-section of the standards developed by the BIA, that section or sub-section would automatically become inoperative.

This conclusion is drawn from the clear language of the

statute granting the Secretary the power to reject for cause "revised standards," language which omits any reference to waived standards. Had Congress intended that the Secretary be able to reject waived standards, it could quite simply have included the word "waived" in the last sentence in §1121(d). It did not, however, and the Secretary can not reject a tribal waiver.

The standards developed by the Bureau are largely based on existing state standards. To the extent that state standards and requirements reflect the special educational needs and circumstances of Navajo students in BIA schools, these standards and requirements are appropriate. To the extent that they do not, however, they are an abdication of the BIA's responsibility to develop appropriate and meaningful standards for Indian education.

Congress anticipated this problem, and directed the BIA to use state standards only where appropriate:

> [T]he Committee is also aware that State standards often do not adequately meet the needs of Indian students. These standards are to be a floor, and are not to be indiscriminately implemented "en masse" by the Secretary.[10]

Congress made clear in P.L. 95-561 that the standards developed for Indian education must be appropriate to the particular needs of Indian students. It directed the Secretary to consider "the special needs of Indian students

and the support and reinforcement of the specific cultural heritage of each Tribe." Congress contemplated that the standards might "serve as a model for educational programs for Indian children in public schools."[11]

At the same time, however, Congress required that the programs of every BIA school must comply with the minimum standards required for accreditation of schools in the state where the school is located. The BIA standards effectuate this requirement.

In several other instances, however, the distribution of authority in the Bureau's standards does not correspond with the language and apparent intent of P.L. 95-561.

For example, the local standards authorize local School Supervisors and their Agency Superintendents to determine whether a school is in compliance with all of the standards.[12] This provision proposes no role for the tribes in evaluating compliance with what are essentially tribal standards.

The regulations also provide for the substitution of alternative standards for those promulgated, by the action of a school board, the Agency Superintendent for Education, and the Director of the BIA's Office of Indian Education Programs. Such a procedure for modifying the formally adopted standards is not contained in P.L. 95-561. The statute provides for waiver and revision of standards only by the

tribes. It does provide for the establishment of alternative or modified standards by the Bureau, but only "when necessary, so that the programs of each school shall be in compliance with the minimum standards required for accreditation of schools in the state where the school is located." No such limitation is placed on the authority granted in §31e.6 of the Bureau's standards.

Clearly, Congress intended that the Bureau be capable of implementing alternative standards only when necesasry, and that the tribal governing bodies, or local school boards <u>if designated by the tribal governing bodies</u>, should have the authority generally to revise standards.

Not only does this provision exceed the terms of the statute by giving authority to parties other than the tribe to substitute alternative standards for those promulgated, it entirely excludes the tribe from the "modification" or "substitution" process. The tribe is not even afforded an to review and comment.

Furthermore, by stating that the modification petition may come from "a school board, through the Agency Superintendent for Education," the regulation leaves unclear who would actually initiate the process.

The intent of the provision may be that the Agency Superintendent should initiate the modification process. The word "through," used to describe the Superintendent's role, is

extremely vague. The language of the provision is not sufficiently precise to identify the moving body.

Finally, with regard to this regulation, unless the Director of OIEP actively and efficiently coordinates schools' modifications, numerous different and conflicting standards may result. Achievement of the long-standing objective of unified Navajo educational standards will be deterred. On the other hand, if the Director does play an important role as a central coordinator of schools' standards, he may very well usurp the proper authority of the tribe and obstruct the self-determination he is charged with promoting.

The Bureau's regulations provide in Section 31e.7 for waiver by the Bureau of standards for which available funding is inadequate. Again, no authority for such waiver exists in P.L. 95-561. The tribe is not authorized by this provision to participate in the process of determining which standards cannot be adequately funded. The concept of self-determination, as established in law and regulation would seem to preclude a unilateral decision by the BIA to waive standards for lack of funds.

A further deficiency in Section 31e.7 of the Bureau's regulations was identified in Seciton IV of this report. The Bureau's regulations state that a tribe may waive standards it deems "inappropriate," changing the language of the Act, which

spoke of standards deemed "inappropriate or ill-conceived." The regulation must be changed to coincide with the unambiguous language of the Act.

It is undeniable that the tribes are conceded a substantial degree of power by the BIA's educational standards. Yet the standards in several significant provisions clearly do not "ensure that Indian Tribes . . . fully exercise self-determination and control." The Navajo Tribe can and should act decisively to resolve the contradictions between the language of the Act and the language of the regulations.

Tribal action is not clearly warranted with regard to the standards for education in public schools. Existing law mandates a less decisive role for tribes in the public school context and political realities apparently dictate a less aggressive tribal posture in negotiations with the states.

Initially it must be conceded that the states are under no legislative mandate to include Indian tribes in the process of developing, monitoring, and evaluating educational standards. Although Arizona's Commission of Indian Affairs and Utah's Board of Indian Affairs may examine educational issues in general, they are not involved in the "nuts and bolts" of developing and implementing educational standards. The New Mexico Advisory Council on Indian Education does

participate in the adoption of statewide standards, but its impact on the results is problematical. These bodies may or may not represent the interests of the Navajo fairly; in any event, they cannot practically serve as vigorous advocates for standards appropriate for Navajo students.

As noted elsewhere in this report, federal law requires states receiving impact aid to agree in all construction contracts to provide Indian students attending any constructed facilities with "standards of education not less than those provided non-Indian students in the school district in which these are situated."[13] This, of course, is not equivalent to a requirement that Indian communities or Indian tribes participate in the development of such standards. Nor is it equivalent to a requirement that the Indian communities or tribes be satisfied with the standards developed. Standards of education for Indian students enrolled in schools of districts receiving impact aid must be not less than those provided all other students in the opinion of the Secretary of Interior, not of the tribe.

The interpretation of "not less than" is critical to the Navajo and other Indian tribes. If the phrase is interpreted to mean "the same as," the legitimate interests of Indian students in culturally relevant educational standards may be neglected. "Not less than" must be interpreted to give effect to the Congressional intent to create "the diverse

opportunities and personal satisfaction which education can and should provide."[14]

P.L. 93-638 requires the Secretary to consult with Indian tribes prior to entering into any contract funded with impact aid monies. The Act provided, however, that "such consultation shall be advisory only," despite the avowed Congressional goal of self-determination for Indians.

Under P.L. 95-561, tribes and parents of Indian children must be given an opportunity to present their overall views to public school boards of schools which receive impact aid. They must be "actively consulted and involved in the planning and development of programs" assisted with impact aid.

That is the limit of statutory authority for tribal involvement in developing standards for Indian education in public schools.

The law and Department of Education regulations establish a detailed complaint procedure whereby a tribe may seek to rectify the failure of a public school to meet these statutory requirements. Tribes may use this complaint procedure to ensure that tribal representatives and Indian parents are, in fact, actively consulted and regularly involved in the development of local education standards.

The language of the statute and the regulations require more than symbolic consultation with Indians in standard-setting. It must be assumed that the statutory requirement

for consultation and involvement was intended to ensure Indians meaningful involvement, including some decision-making authority.

There are no requirements that tribes be similarly involved in the development of statewide education standards. Such a role in state standard-setting is essential, given the substantial power of state departments of education.

States should be reminded of Congress' statement that the educational standards developed by Indians and the BIA for Bureau and contract schools "may also serve as a model for educational programs for Indian children in public schools." This is an indication of Congressional desire to see the states develop educational standards that are "directed toward the attainment of equal educational opportunity" for Indian children.

Contract school boards may adopt their own educational standards. If, however, every contract school individually develops its own set of standards, there will inevitably be many differences among them. If there is any value to a unified system of educational standards for all Navajo students, the Tribe may want to work with all the contract schools to develop a basic, uniform set of standards which would apply to all contract and BIA schools. Standards which need not be uniform for all Navajo schools could be individually developed by the local school boards for both BIA and contract schools, in consultation with the Tribe.

SCHOOL ENROLLMENT

What are the legal criteria for determining whether Indian students attend BIA day schools, BIA boarding schools, or state public schools? Have Congress, the Bureau of Indian Affairs, the states, and the Navajo Tribe set forth different criteria? What action, if any, is needed to reconcile them?

Congress has not spoken specifically to these questions. In P.L. 95-561, Congress directed the Bureau of Indian Affairs to conduct a study of the costs of boarding arrangements for Indian students in Bureau and contract schools, for the purpose of establishing a "national criteria for dormitory situations."[15]

Congress did not direct that these criteria be used to determine when and under what circumstances Indian students should attend particular types of schools. Rather, the criteria are to be used to evaluate the services, facilities, and personnel available at boarding schools and dormitory contract schools.

While Congress has not explicitly expressed a preference for day schools rather than federal boarding schools, P.L. 95-561 does establish as the goal of Indian education "the attainment of equal educational opportunity" for Indian children.[16] Such opportunity must include attending a school close to home. Education does not stop at the school door,

and an educational system that effectively requires many Indian students to attend schools away from home arguably deprives them of an equal educational opportunity.

The House Committee on Education and Labor, in explaining the requirement of national criteria for dormitory situations, intimated that boarding schools are less desirable than day schools. The Committe noted that "parents and tribal leaders throughout the country expressed grave concern that the boarding school experience had been a negative one for their child." The Committee went on to say that "boarding schools, while sometimes necessary, remove children from the protection and warmth of a home environment" (emphasis added).[17] Clearly, the Committee perceived boarding schools as an option to be utilized only when necessary.

The Bureau of Indian Affairs policy with regard to school enrollment is clear: "educate all students as close to their homes as possible."

The BIA manual provides that boarding schools shall be used only by those Indian students "who have no other means of attending school, . . . whose educational needs cannot be met by the schools available to them, and . . . those who require care away from their homes."

The BIA manual states that an Indian student may be admitted to a boarding school if a public or Bureau day school is not available. A school is defined as "available" if it is

not severly overcrowded and is located, or served by a bus route, within "walking distance," i.e., one mile for elementary pupils and 1 1/2 miles for high school pupils.

Although the walking distance standards may be inappropriate in some cases, the Bureau's criteria are consistent with apparent Congressional policy favoring day schools.

The Navajo Tribe has not enunciated a policy concerning boarding schools since the Joint Bureau of Indian Affairs - Navajo Tribal Council Policy Statement of 1961. That statement indicated that Navajo students should attend boarding schools only if they "cannot be accommodated in day facilities." The statement declared that "the value attached to home living with school attendance on a day basis remains a primary objective of tribal and Bureau education policy." The statement's first policy objective made this clear:

> [T]o provide educational opportunities for Navajo children . . . in order that all children may be near their parents. This is the basis of developing an educational system on the Navajo reservation in keeping with the pattern of public education in the United States.

Thus, there is little controversy among the authorities concerning the desirability of Navajo students attending day rather than boarding schools.

There is, however, less agreement as to whether Navajo students should be encouraged to attend public schools rather

than BIA schools. The Bureau of Indian Affairs' policy is to transfer students from federal to state schools:

> Wherever public school opportunities may be made available within reasonable transporting distance of Indian homes, every effort shall be made . . . to encourage the enrollment of students in these schools.[18]

The questions raised by this statement are identified in Part One of this report, at note 54. Its meaning is quite unspecific and, as a result, its application is discretionary and its effect unpredictable. The Bureau will transfer responsibility for the education of Indian students to public schools "wherever such a transfer of responsibility can be accomplished to the mutual benefit of the Indian people, the State, and the Bureau."

The BIA's policy of encouraging the transfer of Navajo students from federal schools to public schools has never been formally endorsed by the Navajo Tribal Council. The 1961 Joint Statement clearly favors day schools over boarding schools, but does not express a preference for public schools over BIA schools.

Although the Joint Statement lists public schools first in identifying the schools that Navajo students shall attend it does not explicitly declare a preference for such schools. The tribe apparently has never formally expressed such a preference.

In light of the Tribe's silence, BIA's unilateral decision to favor the transfer of responsibility for Navajo education to the states and the public schools conflicts with the Congress' and the Bureau's requirement that tribes fully exercise self-determination and control in all aspects of education. This decision is one in which the tribes should certainly have participated.

If the Tribal Council were to pass a resolution declaring its policy with regard to education in public schools and BIA schools, the Bureau would be obligated under the terms of P.L. 95-561, to facilitate the Tribe's policy.

Explicit Navajo tribal policy in this matter is needed. Overlapping public, BIA, and contract school districts have created many problems. Schools are forced to compete for students in order to obtain the federal funds which accompany student attendance. The lack of coordinated attendance boundaries causes schools to entice students to attend with a variety of alleged advantages. Some of these advantages are real and some are not. One very real disadvantage is that students frequently travel several hours a day to and from school.

The Navajo Tribe might consider seizing upon the issue of school enrollment boundaries as a vehicle for obtaining BIA approval of a contract for the establishment of a new education agency on the reservation. The development of consistent and coordinated enrollment boundaries and

procedures is an obstacle to quality education for Navajo children; but it also represents an opportunity for the tribe to move toward real self-determination.

BILINGUALSIM

Federal policy concerning bilingual education has fluctuated in recent years. In 1974 the Supreme Court in Lau v. Nichols, 414 U.S. 563 (1974), required San Francisco schools to provide special assistance to Chinese-speaking students. The court did not say what kind of assistance was required, suggesting that there were several alternatives.

In 1975, the United States Department of Health, Education and Welfare issued guidelines known as the Lau Remedies, which required that most affected children be taught basic subjects in their native tongues at least until they are "fully functional" in English. The Lau Remedies also require that schools provide "bicultural" instruction. These guidelines have been enforced under the threat of delay or withdrawal of federal school aid.

The Reagan administration has consistently opposed federal bilingual education requirements. In February, 1981, Secretary of Education Bell announced that proposed federal regulations requiring bilingual education were being withdrawn.

Although the regulations implementing bilingual requirements were withdrawn, new regulations implementing this administration's policies have not been issued. The Lau Remedies therefore remain in effect.

Furthermore, the Bilingual Education Act, supported by Secretary Bell, excludes non-bilingual teaching methods from federal funding.

Promoting bilingulism, or more accurately multi-lingualism, is the formally adopted policy of the Bureau of Indian Affairs. In the regulations it promulgated to implement P.L. 95-561, the BIA declared its intention to "provide for a comprehensive, multicultural and multilingual educational program."[19]

The states of Arizona, New Mexico, and Utah have enacted state statutes providing for or requiring bilingual education, but local school districts may not be implementing effective bilingual programs. "Despite repeated requests [from Navajos], BIA and public schools have at most met requests [for bilingual education] with watered down 'cultural awareness' programs, which are often taught in English."[20]

The Navajo Tribal Council has not adopted a policy on bilingual and bicultural education. If the tribe is to encourage the states and the Bureau to implement stautory requirements for bilingual education, it must first enact its own policy and program. The tribe should develop its own

model for bilingual and bicultural education based on available research and the experience to date in Navajo schools. The legal authority necessary for the Navajo Tribe to exert substantial control over the development of bilingual and bicultural educational programs already exists. As a practical matter, however, to realize its objectives in this area, the Tribe must first specify those objectives and formally promulgate them.

VI.

CONCLUSION

In 1961, the Navajo Tribal Council stated that "the ultimate education objective is educational competency for all Navajo people." Educational competency may still be the Tribe's ultimate objective; it remains for the Tribal Council to say whether the social, economic, and political changes of the past twenty years demand the adoption of a new education objective.

Perhaps a new objective should be adopted which speaks of the Navajo Tribe's authority to prepare students to assume their responsibilities as citizens of both the United States and the Navajo Nation.

Unless the Tribe is completely satisfied with the language of the 1961 Joint Statement, it should consider

drafting a new tribal education policy statement. This statement should clearly establish whether the goal of educational competency, if that remains the goal today, should be sought by advocating "equal educational opportunity," as recommended in the 1976 Navajo Comprehensive Education Plan, or by striving for Navajo control over Navajo education. Does the Tribe preceive these two objectives as contradictory? Theoretically, tribal control represents the means for achieving equal educational opportunity. The ultimate goal may still be educational competency.

Navajo control of education has been authorized by Congress in P.L. 95-561 and by the Bureau of Indian Affairs in its regulations implementing that Act. Congress directed the Bureau "to facilitate Indian control of Indian affairs in all matters relating to education." The Bureau's response in regulations included the assertion that the Bureau will assist tribes in developing Department of Education, education codes, and comprehensive education plans, and will ensure that tribes fully exercise self-determination and control in education.

If the Tribal Council adopts as tribal policy the concept of self-determination in education, it should give meaning to that policy by setting forth the institutional arrangement it deems appropriate for effecting tribal control.

This arrangement might include a Navajo department of education with authority to plan, make policy, and regulate,

similarly to a state department of education. This agency would not itself operate schools (except in umusual circumstances), but would set standards for the operation of schools by local school boards. It would be accountable to the Tribal Council, through the Council's Education Committee.

The Advisory Committee of the Tribal Council has outlined goals consonant with such an arrangement. By resolution ACAP-47-81, April 16, 1981, it approved the contracting by the Navajo Division of Education of certain BIA Agency, Area, and Central Office functions, in order to (1) establish a Department of Education, as a regulatory agency, with authority to develop standards and policy; (2) accredit schools and certify instructors; (3) monitor and evaluate programs; and (4) provide technical assistance and training to local schools and communities.

Although this resolution passed by a vote of only 7 to 6, it stands as the most authoritative statement of the Tribe's policy. A more detailed resolution by the Tribal Council should be sought to clarify Navajo policy on such issues as the method for assuming new authority and the role of the new Department in public school education.

The jurisdiction of the proposed Department initially should extend to schools formerly operated by the Bureau of Indian Affairs, and subsequently, perhaps, to state public schools. Assumption of the BIA's responsibilities should be

easier to accomplish, as the Bureau has recently indicated its support for the establishment of a Navajo education authority capable of setting policies and standards for Navajo education.

This transfer of responsibility could be accomplished through Congressional action. Such action would be necessary if the Tribe were to assume authority for all schools on the reservation, including public schools.

However, if the Tribe determines that it is more feasible to initially oversee only those schools which were formerly BIA-operated, this could perhaps be accomplished without additional legislation by means of a contract between the Tribe and the Secretaries of Interior and Health and Human Services in accordance with P.L. 93-638. Acceptable assurances by the government of continual funding at the necessary levels would be essential.

Existing NASBA local school boards might function as do local school boards in public school systems. They would direct the operation and management of the school or schools within their jurisdiction. A detailed agreement would be necessary, identifying the respective responsibilities of the Tribe and the school boards.

If a local school board wished to establish an "alternative" school, the school board could contract with the Tribe just as the Tribe currently contracts with the Bureau.

Such a school would generally be independent of tribal authority. All contract schools, whether pre-existing or created by contracts between the school and the Tribe, would be subject only to the general supervision and oversight of the tribal education agency.

Before a tribal education agency could assume similar control over public schools operating on the reservation, the Tribe would have to convince the three state departments of education to endorse the policy of Navajo control of education and, preferably with the assistance of the state agency, then persuade the state legislatures to provide for tribal autonomy in education within the reservation.

Again, the question of funding looms large. The states would have to agree that in acceding to tribal control of education they are not divesting themselves of financial responsibility for the education of their citizens.

The concept of tribal sovereignty may be sufficient legal rationale for a specially created Navajo school system and district extending to the boundaries of the reservation, established upon the request of the Tribe. Although the establishment of a separate Indian school system raises substantial equal protection problems, the sovereignty of the Navajo Nation would distinguish this separate Navajo district, admittedly based on race, from separate public school districts based on race.

The students of the district would be citizens of the Navajo Nation as well as citizens of a state; they hold dual citizenship, unlike the students in non-Indian school desegregation cases. The school system would be that of a sovereign nation, not of a state in the federal union. These critical distinctions justify different treatment of the equal protection issue.

Further support for the legitmacy of such a Navajo school system may be found in the supremacy clause of the Constitution, which requires states to adhere to federal Indian policy. Conflicts between federal Indian policy and state policy generally have been resolved by the courts in favor of the federal government, on the basis of the federal right to supremacy in Indian affairs.

The establishment of a distinct Navajo educational system for which the Tribe would assume full responsibliity may raise fears that the federal government will eventually withdraw its financial support for Navajo education. Concerns that the Tribe will be left to pay all the costs of Navajo education and fears of a revival of the repudiated policy of "termination" may be allayed by a detailed agreement with the Bureau of Indian Affairs and the states for ongoing financial and technical assistance.

However, the Tribe should be extremely careful in

proceeding in this direction. Great harm could be done to the educational prospects of Navajo students in an effort to gain too much, too soon. Budget realities today are such that the BIA and the states may be looking for an opportunity to reduce or eliminate their obligations in Navajo education.

This is the Tribe's dilemma: how to attain educational self-determination without abandoning necessary financial support.

In seeking to achieve "the best of best worlds," i.e., self-determination and continued funding, the Tribe should direct its arguments not only to the governments' legal and moral responsibilities, but also to their self-interest. Their long-term interests - economically and socially - lie in advancing Navajo education. Failure to assume the reasonable costs of assisting the Tribe will cost the governments much more in the long-term than they will save in the short.

The Tribe cannot reasonably expect to realize self-determination in education unless it formally and precisely defines its perception of the meaning of "self-determination." Tribal Council resolutions specifying Navajo educational objectives and policies will provide much-needed leverage in the Tribe's future negotiations with the Bureau of Indian Affairs, the Department of Education, the Congress, and the states.

While such Tribal Council resolutions would not be strictly binding upon federal or state agenicies, they are demonstrations of tribal policy and tribal will. If "self-determination" has any meaning, it demands respect for the responsible education policies which the Navajo Tribe establishes.

FOOTNOTES

1. 25 C.F.R. §31a.4(k).
2. 34 C.F.R. §223.10(c).
3. Rosenfelt, "Indian Schools and Community Control," 25 Stanford Law Review 489,513 (1973).
4. §15-404(A) ARSA
5. 25 U.S.C. §2 (1832).
6. 25 C.F.R. §31.a.4(a)(3).
7. 25 C.F.R. §31.a.4(a)(2).
8. 25 C.F.R. §31.a3.
9. See Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy," 56 Texas Law Review 1195,1223 (1978).
10. Comm. on Education and Labor, Excerpt of a Report on the Education Amendments of 1978, H.R.15, 95th Cong., [Comm. Print] 117 (1978).
11. 25 U.S.C. 2001(b)(2).
12. U.S. Bureau of Indian Affairs, "Part 31e-Standards-Education," (Draft).
13. 25 U.S.C. 458(d)(1).
14. 25 U.S.C. 450(b)(2).
15. 25 U.S.C. 2002(a).
16. 25 U.S.C. 20001(a).
17. Comm. on Education and Labor, supra note 10 at 118.
18. U.S. Bureau of Indian Affairs, 62 BIAM 2.5.
19. 25 C.F.R. §31a.4(h).
20. Task Force Five: Indian Education, Report on Indian Education, Final Report to the American Indian Policy Review Commission 186 (1976).